TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 708. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, VS. BRISTOL-WARNE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY, ET AL.

No. 712. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, VS. BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION, BETHLEHEM STEEL CORPORATION, ET AL.

No. 713. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, VS. RADER-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY, ET AL.

No. 722. THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, VS. PUBLIC SERVICE RAILWAY & GAS COMPANY

No. 723. POCAHONTAS OPERATORS' ASSOCIATION, HOUSTON COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS, VS. BRISTOL-WARNE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY, ET AL.

No. 724. POCAHONTAS OPERATORS' ASSOCIATION, HOUSTON COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS, VS. BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION, BETHLEHEM STEEL CORPORATION, ET AL.

No. 725. POCAHONTAS OPERATORS' ASSOCIATION, HOUSTON COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS, VS. RADER-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY, ET AL.

No. 726. POCAHONTAS OPERATORS' ASSOCIATION, HOUSTON COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS, VS. PUBLIC SERVICE RAILWAY & GAS COMPANY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VOL. 1

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 709

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

BERWIND-WHITE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY, ET AL.

No. 710

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION, BETHLEHEM STEEL CORPORATION, ET AL.

No. 711

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

RAINEY-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY, ET AL.

No. 712

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

PUBLIC SERVICE ELECTRIC & GAS COMPANY

No. 713

POCAHONTAS OPERATORS' ASSOCIATION, EMPIRE COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS

vs.

BERWIND-WHITE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY, ET AL.

No. 714

POCAHONTAS OPERATORS' ASSOCIATION, EMPIRE COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS

vs.

BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION, BETHLEHEM STEEL CORPORATION, ET AL.

No. 715

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vs.

RAINEY-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY, ET AL.

No. 716

POCAHONTAS OPERATORS' ASSOCIATION, EMPIRE COAL & COKE COMPANY, AND POCAHONTAS FUEL COMPANY, APPELLANTS

vs.

PUBLIC SERVICE ELECTRIC & GAS COMPANY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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1 [Caption omitted.]

2 In United States District Court, Eastern District of Pennsylvania

3271—December term, 1924

Berwind White Coal Mining Co., Westmoreland Coal Company, New River and Pocahontas, Consolidated Coal Company, Pennsylvania Coal, Coke Corporation, plaintiffs (Francis B. Biddle, Esq., Barnes, Biddle & Morris, Esqs.)

vs.

United States of America, defendant (George W. Coles, Esq.), and Interstate Commerce Commission, The Central Penna. Coal Producers Assn., Pocahontas Operators Association, et al., intervening defendants (P. J. Farrell, Esq., R. Granville Curry, Esq., A. M. Liverright, Esq., J. F. Bullitt, Esq., Grever & Gillespie, Esqs.).

Docket entries

Feb. 27, 1925. Bill of complaint filed.
Feb. 27, 1925. Exhibits to bill of complaint filed.
Feb. 27, 1925. Subpœna exit—returnable March 19, 1925.
Mar. 9, 1925. Subpœna returned on March 6, served as to each defandant.
Apr. 3, 1925. Appearance of P. J. Farrell, Esq., and R. Granville Curry, Esq., for Interstate Commerce Commission, filed.
Apr. 3, 1925. Answer of Interstate Commerce Commission filed.
Apr. 3, 1925. Answer of United States filed.
May 20, 1925. Petition of Central Penna. Coal Producers Ass'n for leave to intervene filed.
May 20, 1925. Certificate as to mailing copies of petition filed.
May 23, 1925. Petition of Pocahontas Operators Association et al. for leave to intervene filed.
May 25, 1925. Argued.
May 26, 1925. Hearing continued.
May 26, 1925. Stipulation of counsel admitting certain allegations in bill of complaint filed.
3 May 27, 1925. Hearing continued.
May 28, 1925. Hearing continued.
May 29, 1925. Hearing concluded.
Nov. 25, 1925. Opinion, Thompson, J., setting aside and annulling and suspending enforcement of order of Interstate Commerce Commission, filed.
Dec. 15, 1925. Final decree filed.

Feb. 6, 1926. Assignments of error by United States and Interstate Commerce Commissioned filed.

Feb. 6, 1926. Petition for appeal by United States and Interstate Commerce Commission filed.

Feb. 8, 1926. Decree granting prayer of petition for appeal by United States and Interstate Commerce Commission filed.

Feb. 8, 1926. Assignments of errors by intervening defendants (Pocahontas Operators' Assn., Empire Coal & Coke Co., and Pocahontas Fuel Co., Inc.) filed.

Feb. 9, 1926. Acceptance of service by attorney general of Pennsylvania.

Feb. 9, 1926. Order of court granting prayer of petition for appeal of intervening defendants.

Feb. 9, 1926. Citation on behalf of intervening defendants exit.

Feb. 10, 1926. Summons and severance by defendants to intervening defendants filed.

Feb. 11, 1926. Notice of appeal by defendants and acknowledgment of service thereof filed.

Feb. 13, 1926. Citation by United States and Interstate Commerce Commission returned, service admitted and filed.

Feb. 16, 1926. Praecipe as to transcript of record sur appeal filed.

Feb. 18, 1926. Summons and severance of defendants to the Central Pennsylvania Coal Producers' Association and acknowledgment of service thereof filed.

Feb. 25, 1926. Citation by intervening defendants returned, service accepted and filed.

Mar. 5, 1926. Cert. copy of decree extending time in which to complete appeal filed.

Apr. 4, 1926. Bond for costs sur appeal by E. L. Greever in $500 and decree approving same filed.

May 10, 1926. Cert. copy of decree extending time to July 9, 1926, in which to file record sur appeal in Supreme Court filed.

4 July 7, 1926. Decree extending time to September 1, 1926, in which to file record in Supreme Court filed.

Sept. 1, 1926. Cert. copy of decree extending time in which to file record in Supreme Court filed.

Oct. 2, 1926. Certified copy of decree extending time to November 1, 1926, in which to file record in U. S. Supreme Court filed.

Oct. 19, 1926. Stipulation of counsel as to transcript in narrative form filed.

Oct. 19, 1926. Narrative statement of testimony filed.

5-6 In United States District Court

No. 3271

[Title omitted.]

Bill of complaint

Filed Feb. 27, 1925

To the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania sitting in equity:

I

Your complainants, Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahontas Consolidated Coal Company, and Pennsylvania Coal & Coke Corporation, bring this their bill of complaint in equity against the United States of America for the purpose of enjoining, setting aside, and annulling a certain order of the Interstate Commerce Commission entered June 13, 1923, which said order was originally specified to
7 become effective on September 1, 1923, but by successive supplemental orders of the commission is by its order entered December 23, 1924, specified to become effective on March 1, 1925, in a proceeding begun by the commission on its own motion and designated as—

Assigned cars for bituminous coal mines. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel

in so far as said order relates and applies to the distribution among coal mines of privately-owned cars;

And in support hereof your complainants allege and show—

II

Your complainant, Berwind-White Coal Mining Company, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office in the Commercial Trust Building, in the city of Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, and therefore subject to the jurisdiction of this court, owning and operating bituminous coal mines in the counties of Clearfield, Cambria, and Somerset, Pennsylvania, and owning and utilizing in the operation of and shipment of coal from such mines a large number, to wit, 3,036 open-top cars (commonly known as "coal cars"), of a value of approximately six million dollars ($6,000,000); such mines are located on

the lines of The Pennsylvania Railroad Company, a corporate common carrier, and such cars are in service in interstate commerce on the lines of said The Pennsylvania Railroad Company and the lines of other common-carrier railroads connecting therewith.

III

8 Your complainant, Westmoreland Coal Company, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office situated at 224 S. 3rd Street, in the city of Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, and therefore subject to the jurisdiction of this court, owning and operating bituminous coal mines in the county of Westmoreland, Pennsylvania, and owning and utilizing in the operation of and shipment of bituminous coal from such mines a large number, to wit, 2,012 open-top cars (commonly known as "coal cars"), of a value of approximately four million dollars ($4,000,000); that such mines are located on the lines of said The Pennsylvania Railroad Company, and such cars are in service in interstate commerce on the lines of said The Pennsylvania Railroad Company and the lines of other common-carrier railroads connecting therewith.

IV

Your complainant, New River & Pocahontas Consolidated Coal Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal operating office in the Commercial Trust Building, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, and therefore subject to the jurisdiction of this court, owning and operating bituminous coal mines in the New River District of West Virginia, in Fayette County, and in the Pocahontas District of West Virginia, in McDowell County, West Virginia, and owning and utilizing in the operation of and shipment of bituminous coal from such mines a large number, to wit, 1,000 open-top cars (commonly known as "coal cars"), of a value of approximately $2,000,000; such mines are located on the lines of the Chesapeake and Ohio Railway Company, a corporate common carrier, and such cars are in service in interstate commerce on the lines of said The Chesapeake and Ohio Railway Company and the lines of other common carrier railroads connecting therewith.

9 V

Your complainant, Pennsylvania Coal & Coke Corporation, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office in the Land Title Building, Philadelphia, Pennsylvania, in the Eastern

District of Pennsylvania, and therefore subject to the jurisdiction of this court, owning and operating bituminous coal mines in the counties of Cambria, Clearfield, Indiana, and Blair, Pennsylvania, and owning and utilizing in the operation of and shipment of coal from such mines a large number, to wit, 1,000 open-top cars (commonly known as "coal cars") of a value of approximately two million dollars ($2,000,000); such mines are located on the lines of said The Pennsylvania Railroad Company, and such cars are in service in interstate commerce on the lines of said The Pennsylvania Railroad Company and the lines of other common carrier railroads connecting therewith.

VI

The United States of America is made a defendant to this bill of complaint by authority of the commerce court act (36 Stat. L. 539) and of the act of October 22, 1913, commonly known as the district court jurisdiction act (38 Stat. L. 219). The Interstate Commerce Commission is an administrative tribunal created by the interstate commerce act (24 Stat. L. 379), approved February 4, 1887, as amended, particularly by the transportation act of 1920 (41 Stat. L. 456), approved February 28, 1920, and its authority, powers, and limitations are in said acts defined.

VII

Over a long period of time beginning in 1907 the Interstate Commerce Commission laid down and consistently followed as a just, reasonable, and nondiscriminatory rule to govern the distribution to bituminous coal mines in times of car shortage of privately owned cars and cars for railroad fuel what is known as the assigned car rule; as leading cases wherein said commission so promulgated the assigned car rule reference may be had to Railroad Com. of Ohio et al. vs. H. V. Ry. Co., 12 I. C. C. 398, copy whereof is annexed hereto as Exhibit A; to Traer vs. Chicago & Alton Railroad Co., 13 I. C. C. 451, copy whereof is annexed hereto as Exhibit B; and to Assignment of Freight Cars, 57 I. C. C. 760, copy whereof is annexed hereto as Exhibit C.

Assigned cars are of three classes: (1) System fuel cars, i. e., cars assigned to mines on a railroad for the coal of that railroad; (2) foreign fuel cars, i. e., cars of another railroad assigned to mines on a railroad for the coal of the former; and (3) private cars, i. e., cars not railroad owned, assigned to mines for the coal of the owner of the cars. All mines are given for car distribution purposes a "daily rating" (expressed in 50-ton cars and fractions thereof) intended to reflect the potential capacity to produce coal. The total of the daily ratings of all mines is divided into the total number of cars available for distribution, and the resulting fraction is the percentage rate of distribution for the day.

The assigned car rule is—

(a) Assigned cars must be placed at mines to which they are assigned. Private cars assigned to a mine are delivered to and placed for loading at that mine.

(b) If the number of assigned cars equals or exceeds the number of cars to which the mine is that day entitled under the rate of coal car distribution, the mine is not entitled to any railroad cars for loading that day.

(c) If the number of assigned cars does not equal the number of cars to which the mine is that day entitled under the rate of coal car distribution, the mine is allowed railroad cars in addition to bring its total placements that day up to the distributive share to which it is entitled.

In the practical operation of the assigned car rule to the distribution of assigned cars, if a mine to which private cars are assigned has a daily rating of 10 cars and the percentage rate of distribution is 70%, or 7 cars, then—

(1) If the number of private cars assigned to the mine is 7, they would be placed at the mine and the mine would not be entitled to any railroad cars that day.

(2) If the number of private cars assigned to the mine exceeds 7, 7 cars and all additional available private cars would be placed at the mine up to its daily rating.

(3) If the number of private cars assigned to the mine is less than 7, the mine would be entitled to unassigned railroad cars sufficient in number to make the total placements that day equal to 7.

VIII

On March 22, 1921, the Interstate Commerce Commission, on its own motion, instituted an investigation with respect to the reasonableness and propriety of the car distribution rules of all the steam railroads subject to its jurisdiction in so far as such rules applied to private cars and cars furnished for railroad fuel coal, said proceeding of investigation being designated—

Assigned cars for bituminous coal mines. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel

All such railroads were made parties respondents in said investigation including said The Pennsylvania Railroad Company and said The Chesapeake and Ohio Railway Company, but your complainants herein were not then, nor have they at any time since, been made respondents in said investigation, although certain owners of private coal cars, including your complainants, introduced into the record of the investigation testimony relative to the use of private cars under the existing rule, and, together with your complainants and other owners of private cars, presented their po-

sition in a brief filed on their behalf. A copy of the order of the commission instituting such investigation is annexed hereto as Exhibit D.

IX

Under date of June 13, 1923, the Interstate Commerce Commission rendered a report and issued an order in said proceeding of investigation, effective September 1, 1923; the report and order were not, nor have they at any time, been served upon your complainants; the report, as an official report of the commission, is cited as Assigned Cars for Bituminous Coal Mines, 80 I. C. C. Rep. 520; copies of said report and order are annexed thereto marked "Exhibit E." On July 21, 1923, your complainants and many others petitioned the commission for a rehearing and for a postponement of the effective date of the order; by successive supplemental orders of the commission the effective date of the order originally entered on June 13, 1923, has been extended from time to time; meanwhile the proceeding of investigation under Docket No. 12530 was reopened for further hearing by order of the commission, dated October 9, 1923, of which a copy is annexed hereto marked "Exhibit F"; further hearing was had and your complainants and many other private car owners on such further hearing introduced additional testimony in support of the assigned car rule and the lawfulness thereof as applied to private cars, and again presented their position in briefs and upon oral argument; the Interstate Commerce Commission under date of December 23, 1924, rendered a further report and order in said proceeding, cited as Assigned Cars for Bituminous Coal Mines, 93 I. C. C. 701, annexed hereto as Exhibit G.

By said reports and orders the commission has required the carriers to abolish the assigned car rule and has required each respondent thereto, including the Pennsylvania Railroad Company
13 and the Chesapeake and Ohio Railway Company, on or before March 1, 1925, in the distribution of cars to bituminous mines located upon its lines or customarily dependent upon it for car supply, to establish, maintain, and enforce "a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged." (Exhibit E, page 47.)

X

In said reports and orders of the Interstate Commerce Commission privately owned coal cars distributed to and placed at the mines of the owner of such cars, or at other mines for the loading of coal of the owner of such cars, are included in the classification of "assigned" or "consigned" cars; in consequence regulations and practices established, maintained, or enforced conformably to said reports and orders will prohibit the distribution to and placement of privately owned coal cars at the owner's mine, or for the owner's loading, in excess of an exact pro rata distribution of all cars available for distribution to and placement at mines in the same division or district; and such restrictions on the distribution and placement of privately owned coal cars will be continuous during periods of coal-car shortage, even though additional privately owned coal cars be always available for distribution and placement, the railroad company be willing to place them, and the necessary railroad facilities other than cars be always available to effect such additional distribution, placement, and subsequent transportation.

14

XI

There are in operation in interstate commerce on the railroads of the United States approximately thirty thousand (30,000) privately owned coal cars of a value of approximately fifty million dollars ($50,000,000); the cars owned by your complainants represent an investment of approximately $14,000,000, of which a substantial part has been financed through the issuance of car trust certificates sold to the public, and of which the value and security would be greatly impaired if the reports and orders of the commission issued June 13, 1923, and December 23, 1924, and now specified to become effective on March 1, 1925, go into effect; your complainants' cars, under and by virtue of the railroad tariffs regulating their use, earn one and one-half cents (1½¢) per car per mile of service performed as directed by the owner; these tariffs do not provide for compensation for the car in service for others than the owner of the car; the earnings of the cars are barely sufficient to pay for their repairs, and do not cover depreciation or net return upon the investment; these cars are therefore operated solely for the purpose of securing adequate service to the customers of your complainants by assuring them a prompt and regular supply of coal.

Your complainants are advised and aver that the railroad carriers over whose lines their cars move have been and are willing and able to handle them, and to handle the private cars of any shippers who may desire to supply them, without discrimination to other shippers not using private cars.

XII

According as the words "available cars," as used by the commission in its said orders, may or may not be interpreted to include
15 privately owned coal cars, such cars, to whatever extent they may be available in excess of the number accruing to the owner's mine, or for the owner's loading on a pro rata distribution, must, in conformity with said orders, be either distributed to and used for loading by others than their owners, or be idle until such time as a pro rata distribution would entitle the owner to their use. In its reports in this proceeding the commission, by way of justification of its abolition of the assigned car rule, ascertained and relied upon the results of an exact pro rata distribution of all cars, railroad owned and privately owned, among all mines, thereby clearly indicating that upon the abolition of the assigned car rule privately owned cars would be distributed to and used by others than their owners; and in said reports and orders no compensation to your complainants is provided for, either on account of such use of their privately owned coal cars by others, or for such deprivation of the use of such cars by your complainants.

XIII

The interstate commerce act, section 15, paragraph 13, specifically recognizes the right of a shipper to furnish instrumentalities used in transportation and to receive just and reasonable compensation therefor; section 1, paragraph 3, provides that the term "transportation" shall include cars; and section 1, paragraph 12, provides a specific rule to govern car distribution to coal mines during periods of car shortage. The commission in its reports and orders of June 13, 1923, and December 23, 1924, reaffirms its previous finding that paragraph 12 of section 1 is a statutory enactment of the assigned car rule—a rule promulgated by the commission and consistently followed until the order of June 13, 1923—requiring the distribution of and placement at the owner's mines or for the owner's loading, of all private coal cars, in strict accordance with the assignment thereof; section 1, paragraph 14, specifically recognizes the use of privately owned cars in transporting the commerce of the country and empowers the commission to fix the com-
16 pensation to be paid to private car owners for the use of their cars; section 1, paragraph 15, specifically forbids the commission to disregard the ownership rights in privately owned cars even in times of emergency. These and other provisions of the interstate commerce act show a clear intent on the part of Congress that privately owned cars should be continued in operation in and available only for the owner's service, and the commission has recog-

nized this intent of Congress in the past, as is clearly shown by its reports and particularly by its report on its investigation into private cars, cited as In the Matter of Private Cars, 50 I. C. C. 652, a copy whereof is annexed hereto as Exhibit H; it has expressly approved the use of privately owned cars, and has not hitherto condemned such use as discriminatory or unlawful. The commission in its annual reports to Congress has always and consistently held that it is without power to abolish private cars and the private use thereof, as is clearly shown by its report in Ruttle vs. Pere Marquette R. R. Co., 13 I. C. C. 179, a copy whereof is annexed hereto as Exhibit I. Your complainants for many years have been using private cars, purchased, since the Traer and Hocking Valley cases, in reliance on the commission's decisions approving their use, and have entered into contracts with their customers, in many cases public-utility corporations and other public-use consumers, to which prompt and certain delivery of their coal is essential, in like reliance. Your complainants, under their charters and by the law of the States in which they are incorporated and in which they operate, have a recognized and absolute property right in their private coal cars and to the use and service thereof; nevertheless, the commission, in its report and orders of June 13, 1923, and December 23, 1924, although recognizing the long-established rights of owners in private cars, prohibits the beneficial use thereof as unlawful, abolishes the rights of the owners of such cars therein and to the service thereof, under the only circumstances and conditions when they are necessary and valuable to your complainants, and without right or compensation, confiscates their property therein.

XIV

There are in service on the railroads of the United States a large number, believed to be approximately 225,000, of privately owned cars of types other than coal cars, and more particularly refrigerator cars, tank cars, and stock cars. The commission has in recent years conducted an investigation on its own motion concerning the operation of such cars (In the Matter of Private Cars, supra), but has at no time made any order abolishing or restricting the rights of the owners of such privately owned cars other than coal cars, but on the contrary has protected private rights therein; and such other privately owned cars are maintained in the service of the owners thereof, without limitation or restriction, and in such service utilize the facilities of the railroads upon which they are operated, in like manner as do privately owned coal cars.

In recent years there has developed a large and rapidly increasing competition of liquid fuels with bituminous coal, and particularly in the steamship bunkerage, public utility, steam, and domestic

markets: such liquid fuels are shipped and transported in interstate commerce almost exclusively in privately owned tank cars, which are distributed to and operated in the private use of their owners or lessees, who are shippers and/or consumers of such liquid fuels, under the protection of the assigned car practice, which is now denied to your complainants' private coal cars by the said orders of the commission dated June 13, 1923, and December 23, 1924; and in consequence your complainants are unduly discriminated against and unduly prejudiced in violation of the interstate commerce act, in such competitive markets.

The reports and orders of June 13, 1923, and December 23, 1924, constitute an unwarranted attempt on the part of the commission to offset opportunities legitimately accruing to the owners of
18 private coal cars by reason of their ownership of such cars, and to equalize their car supply with that of owners of coal mines who do not own any private cars. Such opportunities are not unjust or discriminatory, but are the reasonable and just result of the investment of capital in such private cars, as in other devices and appliances for efficient mining, loading, and shipping coal, the right and privilege of adopting and using the same being limited only by the capital of the mine owner, or his willingness to so invest his capital.

XV

The reports and orders of June 13, 1923, and December 23, 1924, purport to find that existing rules, regulations, and practices governing the distribution and placement of privately owned coal cars effect an undue preference in favor of the owners of such cars to the undue prejudice of other shippers of coal, and to prescribe new rules, regulations, and practices to govern the distribution and placement of privately owned coal cars in such manner as to avoid such alleged preference and prejudice. The evidence relative to privately owned cars of record before the commission in this investigation is vague, meager, and inconclusive, has reference to only a few isolated instances of the alleged abuse of such private car operation on a small number of railroads, and does not support the finding of undue or unreasonable priority, preference, or discrimination in the use, enjoyment, and operation of privately owned coal cars. The orders are unreasonable and unwarranted attempts by the commission to regulate labor conditions at the mines of your complainants, and to regulate their operation and distribution of coal, and, while in form seeking to avoid the possibility of such discrimination, in substance and effect abolish privately owned coal cars, and deprive their owners of their property rights therein.

XVI

In times of car surplus when carriers with their own cars can more than meet all requirements of shippers for cars, privately owned coal cars can add nothing to the car supply of the owners thereof, and such privately owned coal cars are of value as an additional car supply to the owners thereof only in times of car shortage when carriers cannot meet such requirements. The commission in its report of June 13, 1923, recognizes that a time of coal-car shortage is usually a time of coal shortage. If regulations and practices be established with respect to private coal cars in conformity to said reports and orders such private cars must in part either remain idle, the result being to diminish coal production and distribution of coal in times of coal shortage, or must be distributed to others than the owners thereof, thus diminishing the coal production of the owners and the coal supply of their customers at such times. In either event your complainants will be unable to make continuing and protective contracts with their customers, or to meet their contract obligations to ship coal to their customers, and their customers will be compelled in consequence to purchase additional coal in the spot market to meet their necessities. These contracts were entered into by the customers of your complainants in reliance on your complainants' ability to make deliveries promptly at all times by reason of the ownership and use of their private cars. A very large part of your complainants' production of bituminous coal is contracted and delivered annually to public utilities and other public-use consumers, whose necessities for coal are so great that they have been repeatedly accorded protection by orders of the commission for priority in transportation and car supply during times of emergency, under the authority of section 1, paragraph 15, of the interstate commerce act.

XVII

Your complainants, and each of them, are organized as to capital investment, mine development, supplies, and equipment, working capital, administrative organization, labor force, housing facilities, and selling organization to mine, handle, transport, and market the full amount of coal which, with the full service of their privately owned coal cars, and without discrimination, their mines can produce; the contracts of your complainants were entered into for the sale of coal based on the output which the full service of such privately owned coal cars would enable them to handle; said investment and organization have been made, and said contracts have been entered into by your complainants, and by each of them, in reliance upon constitutional and statutory guarantees as well as upon the repeated decisions of the Interstate Commerce Commission, made

over a period of many years past, protecting the owners of privately owned coal cars in the continued and full service of such cars, and in reliance on the transportation to which they are lawfully entitled from each of the carriers on which their mines are situated, and which they have uninterruptedly had and enjoyed for a long period of years. If said reports and orders of June 13, 1923, and December 23, 1924, and the rules, regulations, and practices thereby required to be established, become effective, your complainants will suffer great and irreparable damage in the loss of returns on their investment; in wastage and disuse of their equipment; in wastage and lack of use for their plant and supplies; in the laying off, demoralizing, and loss of their labor force; in the lack of employment and demoralization of their selling organizations; in the loss of the profits under existing contracts by reason of their inability to deliver the coal contracted to be delivered thereunder; in damage claims for nondelivery; and in loss on prospective sales of coal, and prospective contracts of sale, which, but for the denial and refusal of the use of their own transportation facilities to which they are entitled, your complainants are in position to make.

XVIII

21 Said reports and orders constitute an exercise of authority beyond that conferred by Congress upon the commission, and are clearly in violation of the intent and policy of Congress with respect to privately owned cars; they are based on a misconception of the law, the commission having found that Congress has enacted a different rule into the law; they are arbitrary, in as much as while purporting to prevent preferential treatment and to regulate undue discrimination, they in substance and effect abolish rights in property, viz., private cars, which the commission considers might be used as a means to effect such preferential treatment and discrimination; they are arbitrary in that they require the establishment and maintenance of regulations and practices which will hold idle privately owned coal cars, curtail bituminous coal production and distribution in times of car shortage and coal shortage; they are arbitrary in that they prohibit the assignment of private coal cars under the assigned car rule and in effect abolish the use of private coal cars while contemporaneously permitting the use of private tank cars and the assignment of private tank cars for the transportation of liquid fuels competing with coal; they are arbitrary and unjustly discriminate against privately owned coal cars and the owners thereof by unreasonably curtailing the utilization of other railroad facilities by such privately owned coal cars, while effecting no such curtailment of the use of other railroad facilities by other privately owned cars; and they and the regulations and practices affecting privately owned coal cars required thereby to be

established and maintained are unconstitutional, in that they deprive the owners of property and of the use and enjoyment thereof without due process of law and take such property for public use without just compensation, and likewise deprive your complainants of the use and enjoyment thereof without compensation.

Wherefore, your complainants, and each of them pray:

(a) That a temporary or interlocutory order or injunction be
22 entered, restraining and suspending, until further order of this court, the said orders issued June 13, 1923, and December 23, 1924, and any regulations and practices affecting privately owned coal cars established in conformity therewith, until the final determination of this case.

(b) That this court adjudge, order, and decree that any regulations and practices affecting privately owned coal cars published by any carriers by railroad in conformity with said orders of June 13, 1923, and December 23, 1924, be and the same are in violation of the legal rights of your complainants, and each of them, and unlawfully restrict and deny their right to transportation service from such carriers and are without warrant of law and null and void.

(c) That this court adjudge that the orders of the Interstate Commerce Commission of June 13, 1923, and December 23, 1924, in so far as they authorize or require any carriers by railroad to put into operation regulations and practices affecting privately owned coal cars or to restrict the transportation service and the furnishing of cars by such carriers in accordance with said orders are beyond the lawful authority of the Interstate Commerce Commission, and are without warrant in law and null and void, and that said orders be set aside and annulled.

(d) That this court grant unto your complainants a writ of subpœna directed to the defendant commanding it on a certain day therein to be specified to be and appear before this court and then and there full, true, and complete answer make to all and singular the premises, and to perform and abide by such order and decree herein as this court shall deem meet and agreeable to equity and good conscience.

(e) That this court direct that due and proper notice of this bill of complaint be served forthwith on the Interstate Commerce Commission and on the Attorney General of the United States.

(f) That your complainants, and each of them, may have
23 such other and further relief in the premises as to equity may appertain and as may be deemed by this honorable court fit and proper.

And your complainants as in duty bound will ever pray.

BERWIND-WHITE COAL MINING COMPANY,
By HARRY A. BERWIND, *Vice Pres.*
Attest:
WM. H. WHARTON, *Secy.*
WESTMORELAND COAL COMPANY,
By S. PEMBERTON HUTCHINSON, *President.*
Attest:
HOWARD REPEARSLEY, *Secretary.*
NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY,
By HARRY A. BERWIND, *Vice Prest.*
Attest:
E. H. SANBURN, *Secy.*
PENNSYLVANIA COAL & COKE CORPORATION,
By J. W. SEARLES, *President.*
Attest:
E. B. HOUSER, *Asst. Secretary.*
FRANCIS B. BIDDLE,
JOHN HAMPTON BARNES,
BARNES, BIDDLE & MORRIS,
1421 Chestnut Street, Philadelphia.
AUGUST G. GUTHEIM,
8 Jackson Place, Washington, D. C.
CHARLES HEEBNER,
914 Liberty Building, Philadelphia.
WAYNE JOHNSON,
5 Nassau Street, New York,
Counsel for complainants.

24–26 Duly sworn to by *Harry A. Berwind et al.;* jurat omitted in printing.

27–72 [Omitted in printing.]

73 *Exhibit E to bill of complaint*

Assigned cars for bituminous coal mines. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel

Submitted March 2, 1923. Decided June 13, 1923.

1. Paragraph (12) of section 1 of the interstate commerce act held not in terms to prohibit the practice of assigning cars for railway fuel and private cars to coal mines under the limitations fixed in R. R. Com. of Ohio vs. H. V. Ry. Co., 12 I. C. C. 398, the Traer vs. C. & A. R. R. Co., 13 I. C. C. 451. Assignment of Freight Cars, 57 I. C. C. 760, followed.

2. The practice of respondents in assigning private cars, and system or foreign-line cars for railway fuel, to bituminous coal mines in excess of the ratable share contemporaneously distributed to bituminous-coal mines upon their lines which do not receive assigned

cars, found for the future to be unjust and unreasonable, and unduly and unreasonably prejudicial to mines not receiving assigned cars and unduly preferential of mines which are furnished such cars in excess of the ratable proportion. Cars specially placed by order of the commission under the provisions of paragraph (15) of section 1 of the act may properly be treated as assigned cars, and need not be taken into account in determining the ratable distribution when the order of placement so requires.

Henry Wolf Biklé, J. C. Bills, W. S. Bronson, H. T. Dick, O. W. Dynes, R. V. Fletcher, August G. Gutheim, W. R. McFarland, W. A. Northcutt, H. R. Preston, C. J. Rixey, C. M. Sheafe, jr., D. Lynch Younger, F. M. Rivinus, Frank W. Gwathmey, and J. H. Fishback for respondents.

74 Frederic L. Ballard and Jas. W. Carmalt for private coal-car owners.

Butler, Lamb, Foster & Pope, E. S. Ballard, and Carl D. Loos for National Coal Association; A. M. Liveright for Central Pennsylvania Coal Producers' Association; L. C. Boyle and George N. Brown for Southern Ohio Coal Exchange; R. W. Ropiequet for Illinois Coal Traffic Bureau; and Eugene McAuliffe for Union Colliery Company, King Harlan Coal Company, Union Electric Company, Detroit Edison Company, and Milwaukee Electric Railway & Light Company.

J. J. Kintner for United Mine Workers of America, District No. 2; Albert L. Vogl and Harry F. Nash for Colorado & New Mexico Coal Operators' Association; Jonas Waffle for Indiana coal operators; and S. C. Higgins for New River Coal Operators Association.

REPORT OF THE COMMISSION

ANDREWS, commissioner:

This is a proceeding of investigation upon our own motion, entered upon March 22, 1921, with respect to the reasonableness and propriety of the present car-distribution rules of the respondents, all the steam-railroad carriers subject to our jurisdiction, in so far as they apply to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as may appear to be necessary. Later, we instituted another proceeding of investigation, No. 13896, In re Rules Governing Ratings of Coal Mines Other Than Anthracite and Distribution of Cars to such Mines, which brought before us as to the same respondents the propriety, justness, and reasonableness of the existing mine-rating rules for the distribution of cars as between mines of the class indicated in the title of that proceeding. For procedural purposes the two investigations were consolidated,

75 and a great amount of testimony of wide scope was taken, applicable as might be to one or the other or both of the consolidated proceedings. Thereafter we severed the two proceedings,

and No. 12530 has been submitted for determination, while No. 13896 remains unsubmitted.

Essentially involved is the practice of the carriers as to what are commonly known as assigned cars for loading of coal. Throughout the hearing the testimony dealt with the practices of the railroads using bituminous coal for fuel, and our present determination will likewise be so limited. References to coal herein may be taken as meaning bituminous coal, unless the context shows that anthracite was intended to be included. The inquiry necessarily involves the right to make an assignment or designation of certain cars to specific mines for definite shippers or consignees, and the rule to be observed in times of car shortage in counting such cars in the distribution of equipment among the various mines upon the railroad or a division. The propriety of the practice raises the questions as to whether it is in terms forbidden by law; and if not so proscribed, whether the practice is just and reasonable and otherwise conforms to the tests of the interstate commerce act. Three classes of cars are involved: (1) System cars, or cars of railroad ownership, set for loading upon the line of the owning carrier or such as may be on its line of railroad and not owned by some specific shippers or restricted as to use; (2) cars for foreign railway fuel, which are delivered to another carrier consigned to particular mine operators for loading with fuel for the use of the delivering carrier and return to it; and (3) private cars, which include cars owned or leased or subject to the exclusive control of particular persons, not carriers by railroad, who deliver them to the railroad for placement at designated mines for loading and subsequent transportation as desired by the private-car owners. The coal to be transported in the private cars may or may not be intended eventually to be used for railroad fuel.

Counsel for respondents thus summarize the manner in
76 which assigned cars are placed and how they are counted, in connection with other cars, in determining the cars to which mines are entitled when, by reason of car shortage, it is necessary to distribute the available equipment on a basis less than the aggregate of orders based on the respective mine ratings:

"Assigned cars must be placed at mines to which assigned.

"If the number of assigned cars exceeds the number of cars to which the mine is that day entitled under the rate of coal car distribution, the mine is not entitled to any additional cars for commercial coal loading that day.

"If the number of assigned cars does not equal the number of cars to which the mine is that day entitled under the rate of coal-car distribution, the mine shall be given enough system cars in addition to bring its total placements that day up to the number to which it is entitled."

Throughout this report the term commercial mines will be understood as referring to a mine which does not receive assigned cars.

As to each of these three classes of assigned cars the issue is presented whether the law in terms forbids the present practice of the

respondents, and if not, whether we should find upon the record that the present practice is in any respect unjust and unreasonable or otherwise in violation of any provision of the interstate commerce act. In the consideration of these questions we should have in mind the provisions of paragraphs (10), (11), (12), and (14) of section 1. For convenience these paragraphs are stated in the margin.[1] Paragraph (1) of section 3 also must be considered.

77 Paragraph (12) was the fourth paragraph of section 402 of the transportation act, 1920, and thus was added to and became a part of section 1 of the interstate commerce act, February 28, 1920. It will be necessary to bear in mind the requirement found in paragraph (6) of section 1, which in effect may be said generally to impose the duty upon all common carriers subject to the provisions of the act to establish, observe, and enforce just and reasonable transportation regulations and practices. It will also be essential to have before us paragraphs (15), (16), and (17) of section 1 of the act, which permit us in times of emergency to suspend the operation of any or all of the rules, regulations, or practices then established for such time as we may determine, and to give necessary directions as to car service so as best to promote the service in the interest of the public and the commerce of the people, and authorize us to give preference and priority in transportation, embargoes, or move-

78 ment of traffic under permits, at such time and for such periods as we may determine. The powers conferred upon us in the three paragraphs last mentioned have been exercised repeatedly.[2]

The respondents have proposed for approval a code of rules as to mine ratings and car distribution. As to the assignment and counting of private cars and cars for railroad fuel, their proposal is found in the following suggested rules:

"(8) Private cars, such cars as are assigned to mines for railroad fuel loading in accordance with the decisions of the Interstate Com-

[1] (10) The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

(11) It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $1000 for each offense, which may be recovered in a civil action brought by the United States.

(14) The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices.

[2] 34th Annual Report of Commission, page 11; 36th Annual Report of Commission, page 9.

merce Commission in R. R. Commission of Ohio et al. vs. H. V. Ry. Co., 12 I. C. C. 398, and Traer vs. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"(9) If the number of assigned cars placed at a mine during any period, as provided in rule 8, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

"(10) If the number of assigned cars placed at a mine during any period, as provided in rule 8, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

The rules proposed have the general support of the respondent carriers. They are opposed in their entirety by many associations of mine operators and representatives
79 of mine labor. The National Coal Association, an organization with a large and widespread membership of bituminous-mine operators throughout the United States, opposes the rules in their application to railroad fuel, but takes no position as to the assigned private cars.

I

The rules proposed are the same as those in effect when the present proceeding was instituted upon the lines of respondents which followed the practice of assigning cars, except for the addition of the words "and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission," in the first rule quoted. It seems to be taken by all parties that the rules quoted, so far as they relate to railroad-fuel cars, expressly promulgate the practice which was put into effect by the carriers following our decision in R. R. Com. of Ohio vs. H. V. Ry. Co., supra, and in Traer vs. C. & A. R. R. Co., supra, which we will hereinafter refer to as the Hocking Valley case and Traer case, respectively. The railroads, proponents of the rules quoted, rely upon the authority of those decisions and subsequent decisions applying or sustaining them; while the opponents of the rule contend that the proposals are distinctly counter to the mandate contained in paragraph (12) of section 1 as to the distribution and counting against the mine of all cars furnished or used for the transportation of coal. The opponents of the proposed rules also contend that the assignment of cars as contemplated is an unjust, unreasonable, and unjustly preferential and prejudicial practice in violation of paragraph (6) of section 1, and paragraph (1) of section 3 of the act.

The question of the legality of the practice of assigning cars for railroad fuel substantially in the method outlined in the proposed rules was so carefully considered by us in Assignment of Freight Cars, 57 I. C. C. 760, that but for an attack upon the authority
80 of that report as a precedent we would not deem it necessary to further examine the matter, as there has since been no change in the statute law and the weight of judicial authority has supported the construction we there placed upon paragraph (12) of section 1. But the protestants have pointed out, properly, that the report cited, made in response to a resolution of the Senate of the United States, was necessarily of an ex parte character, and we have accordingly permitted all parties to be heard fully upon this basic question.

A brief review of our previous decisions involving this subject will be helpful.

Prior to 1907 the railroads commonly delivered to coal mines cars privately owned or leased, foreign railway-fuel cars, and cars for the carriers' own fuel loading, according as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal. It was the usual practice to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. All such cars were given to the mines for which they were intended and such mines received in addition their full share of the other cars available for distribution. Thus the cars assigned were not counted against the mine, as the phrase commonly ran.

The practice of the carriers in not counting foreign railway-fuel cars and private cars against the mines to which consigned or assigned was brought before us by complaints filed by the Railroad Commission of Ohio against the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, respectively, which were disposed of together. The second case involved the so-called private cars, claimed to have been bought by certain coal operators, which were not included in or charged against the percentages of distribution of cars to coal-mining companies. Both complaints put in issue the practice of defendants in permitting the assignment of foreign railway-owned fuel cars consigned to certain coal companies with which the foreign railway had contracts
81 stipulating for the furnishing of cars, and failing to count them against the mines. The basis of both complaints was unjust discrimination under the law as it then stood. And, although the right of the commission to prescribe a regulation or practice in respect to transportation which was just, fair, and reasonable to be thereafter followed was adverted to, the basis of our decision was discrimination. Our decision, made July 11, 1907, has been cited. We held in effect that the private cars and foreign railway-fuel cars as described should be given to the mines to which they were consigned or assigned, but must be counted against the

distributive share of the mines. If such specially consigned or assigned cars equaled or exceeded the distributive share of a mine receiving them, the mine should have no additional cars, but if not equal to the distributive share, it should be given only sufficient additional cars to make up its distributive share.

In the Traer case, April 13, 1908, we followed the Hocking Valley case, and further held that cars used by defendants upon their own lines for transportation of their own necessary fuel supply may be given in any numbers to the mine or mines from which such fuel supply is received, but if such mine or mines also ship commercial coal the fuel cars so supplied must be counted against the mine or mines. An order was made to carry the findings of discrimination into effect. Injunction proceedings brought against the commission by interested carriers resulted in a decree of the Circuit Court of the United States for the Northern District of Illinois enjoining the effect of the order so far as it required carriers to count their own fuel cars against the mine shares, but the order was sustained in other respects. Chicago & A. R. R. vs. Interstate Commerce Commission, 175 Fed. 930. On appeals by the commission the Supreme Court reversed the decree of the lower court and held the act had delegated to us authority to determine on complaint the question of distribution of the carrier's own freight cars in times of car shortage as a means of prohibiting the undue preference and unjust dis-
82 crimination forbidden by the act. Power to make the order, and not the expediency or wisdom of it, was the essential issue before the court. Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S. 452, id., vs. C. & O. R. R. Co., 215 U. S. 479.

The rule laid down by us in the Hocking Valley case was followed in Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. 86, and in Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. 356. In the last-cited case a rule applied by the carrier was condemned as giving undue advantage in distribution to certain mines and as contrary to the decisions of the commission previously referred to, and in a subsequent report, 23 I. C. C. 186, reparation was awarded. The award of reparation was later sustained by the Supreme Court. Penna. R. R. vs. Clark Coal Co., 238 U. S. 456.

In our report to the Senate and House of Representatives in Coal and Oil Investigation, 31 I. C. C. 193, 218, we repeated the substance of what we had found in the Hocking Valley and Traer cases. We expressed the view that when the carriers should adjust their rules in accordance with the views of the commission as expressed in the cases cited (and others) no doubt many of the irregularities found to exist would be eliminated.

The rule thus limiting the permissible assignment of cars either privately or railroad owned without counting them against the distributive share of the mines was definitely established and remained in effect as a rule in a state of repose until the advent of Federal control over the railroads and over the production, distribution, and

price of coal. That rule was substantially as found in rules 8, 9, and 10 proposed by the respondents, with the exception of reference to cars specially assigned by our order, which is a new addition. The rule was accepted as settled, and although never acquiesced in by commercial mine operators as settled on the right basis, was not the subject of any formal complaint to which our attention has been directed down to the period of Federal control.

83 The United States Fuel Administration put into effect a zoning system for the distribution of coal. About July 1, 1918, authority for use of assigned cars for railroad fuel was withdrawn, but the actual discontinuance was somewhat delayed pending some provision being made to take care of carriers' emergency needs when necessary. No change was made in the rule with respect to private cars. Effective October 10, 1918, the United States Railroad Administration promulgated a code of rules for rating tipple coal mines (other than anthracite) for car-distribution purposes, known as Circular CS-31. Rules 6, 7, and 8, of that circular provided:

"6. Private cars and such cars as are assigned to mines by the car service section, United States Railroad Administration will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"7. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"8. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

This code of rules was superseded, effective January 10, 1920, by Circular CS-31 (revised) and rules 6, 7, and 8 became rules 8, 9, and 10, but contained no change in substance.

The essential change effected by these circulars from the
84 rules laid down in the Hocking Valley and Traer cases was to withdraw the authority for the placement of railway-fuel cars on an assigned basis from the individual rail carrier and to lodge that power in the car-service section of the United States Railroad Administration. No change was made in the counting requirements as announced in the Hocking Valley and Traer cases. When Circular CS-31 was promulgated there was no general car shortage, and the effect was not apparent. By the fall of 1918 there was a car surplus which continued until the summer of 1919, and in the meantime the Fuel Administration had discontinued operation. A car shortage developed in the late summer, and numerous

railroads found themselves short of coal. The railroad administration took the position that if an operator had a contract for the loading of railroad fuel he would have to load on that contract preferentially and without assigned cars, or the coal would be confiscated at the tipple before it was commercially billed. This practice continued until the fall of 1919. Then the central coal committee under the railroad administration began to function and continued until the termination of Federal control March 1, 1920. The central coal committee directed that cars for railroad fuel be placed in preference to cars for coal loading for other purposes. This was the status which existed at the time of the enactment of the transportation act, 1920, which, as we have seen, brought paragraph (12) into section 1 of the interstate commerce act, effective March 1, 1920.

On March 2, 1920, in a notice to carriers and shippers, we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial, and especially during the remainder of the early spring, the uniform rules as contained in the railroad administration's car-service section Circular CS-31 (revised) be continued in effect. These rules made no provision for the assignment of cars for railroad fuel loading after the termination of Federal control. We had suggested that carriers and coal operators attempt to compose their differences with respect to the matter of the carriers' fuel supply, but conferences to that end were unavailing. The supply of cars available for the transportation of coal was insufficient to meet the demand, and carriers resorted to wholesale confiscations in order to protect their fuel needs. Injunction proceedings brought against the practice of confiscation in at least one case resulted in a decree adverse to the carrier.

On April 15, 1920, in a further notice to carriers and shippers, we amended the recommendation in our notice to carriers and shippers of March 2, 1920, to read as follows:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Com. of Ohio et al. vs. H. V. Ry. Co., 12 I. C. C. 398, and Traer vs. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

Senate Resolution No. 376 was adopted May 24 (calendar day May 29), 1920. By it we were directed to inform the Senate upon what authority, if any, our order of April 15, 1920, entitled "Notice

to carriers and shippers," was issued. In the preamble to the resolution the order of April 15, 1920, was set out in full. In our report in answer to that resolution, Assignment of Freight Cars, supra, on June 11, 1920, we reviewed our various decisions and those of the courts bearing on this question, and stated:

"The commission is of opinion that paragraph (12) of sec-
86 tion 1 of the interstate commerce act does not change the rule of law laid down in the Hocking Valley and Traer cases, supra. The paragraph states in statutory form that which had theretofore been the law, pursuant to the decisions of the commission and of the Supreme Court of the United States."

The language of paragraph (12) of section 1 has remained unchanged. Although our construction of the paragraph was specifically brought to the notice of the Senate, in response to a call for information as to the authority for the issuance of our order, and although our action in this regard was reported to both the Senate and House of Representatives in the annual report which by law we are required to make to the Congress, there has been no legislation in the three years which have elapsed to correct any error of interpretation upon our part. A bill declaring that paragraph (12) carried a rule of equal proportionate distribution of cars to coal mines, introduced in the Senate in the Sixty-seventh Congress, first session, was not reported out of committee.[1]

If the statute in question is at all doubtful in construction, the construction adopted by this administrative agency in its enforcement, followed for many years, without any attempt of Congress to change it, even when a bill for that purpose was long pending before it, and without any challenge of its correctness by any other department of the Government, while not controlling, is not to be disregarded without the most cogent and persuasive reasons. Robertson vs. Downing, 127 U. S. 607.

During a period of acute car shortage in the summer of 1920 it developed that rule 8, as embodied in our notice of April 15, 1920,
had been and was being applied by particular carriers in a
87 manner inconsistent with and contrary to the principles applicable in the Hocking Valley and Traer cases, and that uncertainty and undue preference and prejudice resulted. Accordingly, on September 28, 1920, we issued service order No. 18, effective October 1, 1920, and reissued the rules laid down in our order of April 15, 1920, with the following proviso:

"Provided, That common carriers by railroad may not assign cars for their own fuel and fail to count such cars against the mine's

[1] S. 2005, introduced June 6 (calendar day, June 7), 1921. The bill sought to amend paragraph (12) of section 1 of the act by adding the following:

Provided, That nothing contained in the foregoing subdivision shall authorize the commission at any time to suspend, modify, cancel, alter, or amend the provisions of subdivision 12 of this section which require equal proportionate distribution of cars to coal mines.

distributive share unless the entire output of such mine is taken by such a carrier for a period of not less than six consecutive months."

This order remained in force until March 24, 1921, when it was canceled, as the emergency which had called it into effect had been measurably relieved. The investigation here under consideration was instituted simultaneously with the order of vacation.

The National Coal Association, protestant herein, contends that the first sentence of paragraph (12) is a broad requirement that every carrier shall make just and reasonable distribution of cars among mines at all times whether there be a car shortage or car surplus; that the duty of establishing rules which will effectuate such just and reasonable distribution is left with the carrier in the first instance, subject to review by us under the provisions of section 15. It is not disputed—in fact, it is contended—that under this sentence we would have ample power to prescribe the same rules as we did in the Hocking Valley and Traer cases. But that association contends that in the second sentence it is specifically provided that during any period when the supply of cars does not equal the requirements of the mines, it shall be the duty of the carrier to maintain and apply just and reasonable mine ratings, and to count each and every car furnished to or used by a mine for transportation of coal against the mine. The two provisions taken together, the application of ratings and the counting of every car, it is contended, require that during periods of car shortage available cars must be distributed in exact mathematical proportion to mine ratings. It is insisted that the words "to count each and every car furnished to or used by any such mine for transportation of coal against the mine" do not have the restricted meaning attributed to them by respondents. It is argued that the counting requirement of the Traer and Hocking Valley rule did not mean a mere enumeration of cars for the purpose of ascertaining whether the mine receiving them may have additional commercial cars, but did mean that all cars shall be exactly prorated in accordance with ratings. This is so because in every case where the Traer rule was discussed or announced there was attached to the counting requirement a qualification that all assigned cars shall nevertheless be delivered to the mines to which assigned or consigned, plainly indicating that an unqualified counting requirement would have called for a pro rata distribution.

The respondents place themselves behind the position that paragraph (12) does not change the rule in the Hocking Valley and Traer cases, taken by us in our report to the Senate, Assignment of Freight Cars, supra. They do not find it necessary to give the words "and to count each and every car used for transportation of coal against the mine" a meaning that all cars shall be prorated, whether assigned or unassigned. They find a purpose on the part of Congress in importing these words into the act, of adding a legislative mandate and to give permanency to a rule which had thereto-

fore been an administrative determination, made upon the facts as appearing of record in particular cases, and therefore subject to change by the same administrative tribunal as its ideas of policy might vary, or as the record in particular cases might require. Our well-known practice has been to regard such determinations as made only upon the facts and under the conditions presented in the particular record. It was clearly within the power of Congress to apply at their convenience the rule, which, as is apparent from what has preceded, was a limitation upon a practice of the carriers long
89 existing, which the carriers had claimed the right to perpetuate, and as against the perpetuation of which there stood merely an administrative finding of fact based upon facts as disclosed in records made some 13 years before, binding upon but a few out of the hundreds of railroads subject to the act. Up to the time of the enactment of the transportation act, 1920, our findings as embraced in the Hocking Valley and Traer cases had been bottomed upon the fact of discrimination, and we had not attempted to prescribe a rule as reasonable. We had no occasion to pass upon that question after the car-service amendment of 1917 was enacted [1] until the close of Federal control. It might well be that Congress found the rule to be reasonable, as well as nondiscriminatory, and that it intended to settle the policy that such cars must be counted against the distributive share, as that phrase was then understood, and to prohibit the placement of additional cars at mines for commercial loading if the assigned cars placed equaled or exceeded the pro rata share. The construction placed upon paragraph (12) as stated in our report to Congress is entirely consistent with this view.

We may briefly examine the legislative history of the provision in question. A comprehensive bill (S. 3288), intended to make amendments to the act to regulate commerce necessitated by the imminent return of the railroads from Federal control to their owners, undertook to prohibit the assigned-car practice in precise and detailed terms. (Section 34, page 76, of the bill as amended and agreed to by the Senate.) This bill in this respect had been strongly advocated by the National Coal Association, except that the association did not approve a proviso which would have given power to the proposed transportation board to assign railway-fuel cars. The association thereupon suggested to the chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, then considering H. R. 4378, that the committee
90 incorporate amendments to carry into the House bill the provisions of section 34 of the Senate bill, with the exception of the proviso mentioned. The substitute proposed was presented to the committee of the House by counsel for the association. (Hearings upon H. R. 4378, pages 2172–2191.) Subsequently the House committee called before it Commissioner Clark, then chairman of

[1] An act to amend an act entitled "An act to regulate commerce," as amended, in respect of car service, and for other purposes, approved May 29, 1917.

this commission. A portion of the examination of our chairman by the chairman of the House committee appears in the margin.[1]

The bill as reported to the House did not contain the amendments suggested by the coal association, but did contain the precise language contained in the first two sentences of paragraph (12), as heretofore quoted. In Report No. 456 to the House of Representatives on bill H. R. 10453, which became the transportation act, 1920, the committee said:

91 "* * * Originally the term 'car service' included 'the movement, distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include 'the supply, movement, and operation of trains by any carrier by railroad subject to this act,' and so require every carrier by railroad 'to furnish safe and adequate car service.' In a recent decision of the Supreme Court of the United States it was held that under the commerce act the commission does not have the authority to order a common carrier to supply itself with certain cars. The pending bill gives the commission such authority.

"The same section makes it the duty of every common carrier, or railroad, 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines for transportation of coal against the mine.' During Federal control such a rule has been followed by the director general and the committee follows the decisions of the Interstate Commerce Commission and the present practice and has put in form of law

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[1] The CHAIRMAN. Mr. Clark, are you familiar with the provision inserted in the Cummins bill with reference to coal-car distribution? They have a section devoted to it.

Mr. CLARK. I remember there is such a section, but at the instant I do not recall the particular provision.

The CHAIRMAN. It seeks to carry into the law the orders of the director general now with reference to car distribution.

Mr. CLARK. That leads me to say that in the earlier days of the Railroad Administration this very question of refraining from counting against the distributive share of the mine the cars that were sent for the carrier's own fuel supply came up. Some members of the director general's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. My understanding is that the rule adopted was based upon the principles laid down by us and that they are following the practice of counting those cars against the distributive shares of the mines.

The CHAIRMAN. You would be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation?

Mr. CLARK. I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The CHAIRMAN. The idea expressed by the representative of the coal association was that when Federal control ended there might be a recurrence to the old practice.

Mr. CLARK. Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I cannot see any possible objection to carrying it into the statute.

what had been enunciated as proper practice. (Report No. 456, page 17, 66th Cong., 1st sess.)

"Paragraph (12) of the amended section incorporates in the statute a rule laid down by the commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, thus avoiding any possibility of the recurrence of the
92 evil of what is known as 'assigned cars'." (Report No. 456, page 27, 66th Cong., 1st sess.)

The only rule which had been laid down by the commission as to just and reasonable distribution of coal cars among the mines and upheld by the Supreme Court was that stated in the Traer and Hocking Valley cases, sustained in the Illinois Central and Alton cases, supra.

The Senate bill, which contained the amendments suggested by the protestant association, and the House bill, which had not incorporated the amendments that association had suggested, went to conference. The conferees adopted the provisions of the House bill in this respect.

It is claimed that the chairman of the House committee and the chairman of this commission were "obviously at cross purposes" in their discussion, and that the chairman of the commission was in error in his understanding that the rule adopted by the director general's staff was based upon the principles laid down by the commission. Our chairman, however, was warranted in his statement by the provisions of Circular CS-31 (revised), already quoted, although the designation of cars to be assigned was made by the car-service section of the United States Railroad Administration, instead of by the particular carrier as previous to Federal control. This minor distinction in nowise impairs the general accuracy of the statement made by our chairman.

The words used in the second sentence of paragraph (12), "to count each and every car furnished to or used by any such mine for transportation of coal against the mine," were not new in this connection, but substantially the same words had been used in the Hocking Valley, Traer, and Hillsdale cases, supra, and in Royal Coal & Coke Co. vs. S. Ry. Co., 13 I. C. C., 440, 449, and in some of the court decisions. In none of those cases was it found necessary to give the words quoted the meaning of equivalency to pro rata distri-
bution, or as inconsistent with the practice which followed our
93 decisions in those cases. In fact, in the Hillsdale case we held that "all such (assigned) cars must be counted against the distributive share of the mine receiving them" (19 I. C. C. 364), and virtually substantial language was employed in the mandatory clauses of our order in that case. The words also had a widespread usage in railroad and traffic circles at the time of the enactment of the transportation act, and that usage was consistent with that expressed by us in our report to the Senate, supra. While, in the expression of the rule which originated in the Hocking Valley and Traer cases, the

words "count against the mine" were continually being applied as a necessary term in the formula, it was always recognized that the rule with these words in it was not the equivalent of a requirement for equal proportionate distribution of cars assigned and unassigned to coal mines. With this usage Congress was no doubt familiar, as we are.

The question here presented has been passed upon by the Federal courts in three cases. In Corona Coal Co. vs. Southern Ry. Co., 266 Fed. 726, and in Cleveland & Western Coal Co. vs. B. & O. R. Co., 283 Fed. 995, the District Courts of the United States for the Northern District of Alabama and Northern District of Ohio, respectively, expressed the opinion that the intent of Congress was to put into statutory form the rule theretofore expressed in the Hocking Valley and Traer cases. A contrary view was expressed by the Circuit Court of Appeals in the Fourth Circuit, in B. & O. R. R. Co. vs. Lambert Run Coal Company, 267 Fed. 776, reversing on this point the District Court of the United States for the Northern District of West Virginia, which had found upon this point in consonance with the Corona case. But the Circuit Court of Appeals was itself reversed as having no jurisdiction in the premises. Lamberts Run Coal Co. vs. B. & O. R. R. Co., 258 U. S. 377. While giving to the opinions of the Circuit Court of Appeals all the respect due to the deliberate findings of such a judicial tribunal, its determination of a question of law, made in a proceeding where no jurisdiction vested, and where the Government as a necessary party was absent,
94 and was not heard upon the construction of the statute, can not be accorded weight as determinative of this issue.

We therefore conclude that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act.

II

Although the rules proposed for application during future periods of car shortage may not in terms be forbidden by law, we must determine whether in fact they are just and reasonable, as required by section 1, and whether they result in undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage in any respect whatsoever, forbidden by section 3 of the act. These questions may be considered together. First we will deal with the assigned car for railroad fuel, system and foreign line. At the outset we are led to repeat that we must deal with questions of this character upon the basis of the record as now developed. The decisions previously cited have left intact these questions as they are presented to us in the light of present-day facts.

Certain premises meet general acceptance in this record. It is recognized that the importance of the railroads in the distribution of coal and other commodities, and their general dependence upon bituminous coal in producing transportation, require that in some

lawful way they may be assured of a steady supply of suitable coal. It is likewise generally admitted that, whatever means are adopted to secure such supply, emergencies will occur when the supply will fail unless the railroad is enabled by some means within the law to take sufficient coal ahead of less necessitous uses to keep the flow of traffic going as the public interest requires. There is no dissent from the proposition that confiscation of fuel coal by railroads is a practice to be avoided. It seems to be generally accepted that the public interest requires that the carriers shall not be subjected to unreasonable prices. Obviously the carrier should not be permitted to take
95 advantage of a means provided by the public to insure an uninterrupted movement of traffic, as a means to coerce an unreasonably low price for fuel.

There is enough bituminous coal in the ground in this country to more than supply the demands of all consumers for a long period. There are more than enough miners to produce coal for all purposes. There are more mines than is consistent with the most efficient use of equipment, and their aggregate capacity exceeds greatly the country's demand. The demands for coal are seasonal, and as a result we have frequent seasonal or local car shortages. In 1916, when we began to feel the effect of the war in Europe, we experienced widespread car shortages, resulting in an investigation by us on our own motion. (Car Supply Investigation, 42 I. C. C. 657.) The more recent general coal-car shortages and the steps taken to insure to carriers their fuel needs have already been adverted to. The aggregate time lost because of car shortages, local and general, is a considerable proportion of the whole of any recent elapsed period of time. And during each period of car shortage the practical problem of supplying the railroads with fuel has been presented sharply, and the meeting of the problem has been most troublesome, and has necessarily involved considerable general disturbance of production and transportation. The large proportionate demand for bituminous coal made by the railroads—nearly 28 per cent of the total consumed and exported by the United States annually—adds to the difficulty of the situation.

The means employed by the railroads in securing coal for fuel purposes vary widely. Some carriers own mines from which they secure a large portion of their requirements; others contract for the entire output of certain mines for a definite period of time; and still others contract for a partial output on a day-to-day basis. Some secure their coal supply by the use of the assigned cars under the rules in the Hocking Valley and Tracy cases, and others secure their fuel without assigned cars. According to the record, on October 1, 1922, the following Class I carriers and bituminous coal-loading railroads not included in Class I were securing their fuel supply without the use of assigned cars:

96 Arizona & Eastern.
Atchison, Topeka & Santa Fe.
Atlanta, Birmingham & Atlantic.
Atlantic Coast Line.
Beverly & Southern.
Boston & Albany.*
Buffalo, Rochester & Pittsburgh.*
Carolina, Clinchfield & Ohio.*
Cambria & Indiana.
Charleston & Western Carolina.
Chicago & Illinois Midland.
Cincinnati, Indianapolis & Western.*
Chicago & North Western.
Chicago, St. Paul, Minneapolis & Omaha.
Colorado Northern.
Cumberland.
Delaware, Lackawanna & Western.*
Duluth, Missabe & Northern.
Detroit & Mackinac.
Duluth, South Shore & Atlantic.
Elgin, Joliet & Eastern.*
El Paso & Southwestern.
Fort Dodge, Des Moines & Southern.
Georgia & Florida.*
Great Northern.
Green Bay & Western.
Huntingdon & Broadtop Mountain.
Lake Erie, Franklin & Clarion.
Lehigh & Hudson River.
Louisiana Railway & Navigation.
Lehigh & New England.*
Lehigh Valley.*
Litchfield & Madison.
Maine Central.
Minneapolis & St. Louis.
Mississippi Central.
Mobile & Ohio.
Monongahela.*
Montour.
New York, Ontario & Western.
Pittsburg, Shawmut & Northern.
Richmond, Fredericksburg & Potomac.*
St. Louis San Francisco.
Staten Island Rapid Transit.
Seaboard Air Line.
Tennessee Central.
Toledo, Peoria & Western.
Union Pacific.
Union.
Utah.
Western Maryland.*
Montana, Wyoming & Southern.

The carriers indicated by an asterisk employed assigned cars in securing their fuel during the 1920 shortage.

Certain of these carriers, notably the Union Pacific, Great Northern, Chicago & North Western, Minneapolis & St. Louis, and Atchison, Topeka & Santa Fe, own mines from which they secure a considerable portion of their fuel. It will be helpful to state briefly as illustrative the practices of certain of the larger carriers which employ assigned cars in securing their fuel, and the justification they present.

The Illinois Central secured by means of assigned cars from 60 to 75 per cent of its fuel requirements from the Madison Coal Corporation, of which it owns all of the stock. This coal corporation owns eight mines in Southern Illinois on the St. Louis division of the Illinois Central, and does not engage in commercial business. The balance of the carrier's fuel is secured by seasonal contracts of
97 30 days, or as needed during periods of car surplus. The president of the railroad company testified that the assigned cars were essential for the following reasons. (1) They gave the carriers a regular and certain supply of coal in times of car shortage. (2) The coals from different fields are not of the same grade, which requires that certain adjustments be made in the locomotives. The Alabama coal is a different grade from that mined in southern Illinois, and again, the coal in different counties in Illinois has different burning qualities. (3) Unless the carriers can contract for a regular and suitable supply of coal, resort to confiscation becomes necessary. (4) Going into the spot market would increase the price of coal, not only to the carrier but to the consuming public as well. This carrier burns about 5,000,000 tons of coal per year, or from 250 to 320 carloads per day, and usually has on hand about 20 days' supply. During the winter it undertakes to store from 30 to 45 days' supply.

The Chicago Great Western owns a mine on the lines of the Illinois Central, and has provided itself with hopper bottom cars which are assigned to the mines to take care of its fuel needs. This

road has facilities for unloading the cars into receptacles that elevate the coal for direct delivery to the engines.

The Pere Marquette consumes approximately 900,000 tons of coal per year, or from 45 to 60 carloads per day, secured largely from mines in eastern Ohio, Kentucky, West Virginia, and Pennsylvania. It solicits bids from about 500 coal producers. These bids are all on a standard specification, and contracts are made with a few operators whose offer is most advantageous, considering quality as well as price. Some three or four years ago it purchased 1,000 all-steel hopper-bottom self-clearing coal cars expressly to take care of its fuel requirements. It has installed modern fuel stations at all the large terminals to enable the economic use of self-dumping cars and avoid the necessary expense of shoveling the coal. The coal is dumped into either an elevated trestle or a hopper. During
98 the summer months it stores about 100,000 tons, or about one month's supply, to take care of its needs during the extreme winter weather. In 1921 it stored about 130,000 tons, or six weeks' supply. It estimates the cost of storing and picking up the coal at 70 cents per ton.

The position of the New England carriers is practically the same. They have no sources of fuel on their own rails, and are dependent upon mines in Pennsylvania and West Virginia located on the lines of other carriers. The New England carriers normally consume about 6,000,000 tons of coal per year. During the year 1920, due to abnormal market and transportation conditions, the New York, New Haven & Hartford bought large amounts of spot coal at high prices. Its fuel that year cost $45,700,000, equivalent to approximately 28.1 per cent of the transportation costs. In 1921 its fuel bill amounted to $33,500,000, or approximately 25.7 per cent. of transportation costs The New Haven customarily covers its requirements by contracts for the coal year. Its contracts are based on quality, prospects for regularity in supply, and price. The New England carriers have found it necessary to lay in a seasonal supply of fuel for protection against irregularity in mine loading as well as slowing up of transportation. They have facilities for seasonal storage of an aggregate capacity of 1,200,000 tons. The usual seasonal storage is approximately 800,000 tons, or 13 per cent. of their normal requirements. They have extensive facilities for seasonal storage, including yards with parallel tracks for ground storage, similar yards with trestles for dumping, bins and overhead movable cranes, facilities in connection with tidewater discharge plants, and where the winter is more severe large covered bins. The cost of storage is estimated at from 50 to 60 cents per ton.

About 55 per cent. of the New Haven's coal is devide direct to locomotive tenders through mechanical coaling stations at the more important terminals, which have storage capacity for several days. About 28 per cent is delivered by locomotive cranes at the less im-

portant terminals. The remainder, 17 per cent., is delivered
99 through outlying points where locomotives lay out and where consumption does not justify either facility. The coaling points on the New Haven average one to every 29 miles, and on the Boston & Maine one to every 37 miles. These different conditions of unloading compel the movement of the proper type of car to each destination.

The assigned car, the New Haven claims, enables it to secure a uniform quality and grade suitable for its requirements and favorable to good service; permits the placing of contracts for yearly consumption at reasonable prices; requires the use of a minimum number of cars on consuming line in its fuel service, results in an increase in the number of cars available for commercial loading; reduces unloading costs, as the unloading facilities and types of cars are each adapted to the other; affords a greater opportunity for solid train movement of empties and loads; and affords a better standard of maintenance and equipment on account of system cars being more regularly at home. The New Haven claims that a railroad attempting to procure its fuel supply without the use of assigned cars is under serious disadvantages, which we will summarize. Overcontracting for fuel is required to safeguard against irregular supply; an excessive supply of coaling cars must be held with resulting heavy increase in per diem to consuming road; excessive switching costs to both originating and consuming lines are incurred in selecting proper types of equipment for railroad fuel; the unloading costs on the consuming line are excessive on account of different types of cars; greater unloading storage must be provided to meet seasonable requirements entailing higher handling costs; and the purchase of spot coal at higher prices or the confiscation of commercial coal or fuel coal consigned to another carrier is inevitable.

The New England carriers do not use assigned cars to secure their entire fuel-coal supply. Seemingly, in the absence of an order from us specifically authorizing the practice, they secure their fuel supply without assigned cars. Some of their coal moves by way of
100 tidewater, and assigned cars are not placed at the mines for the loading of such coal.

The Baltimore & Ohio consumes from six to seven million tons of coal annually. During the four years preceding 1922 the coal consumed averaged 17 per cent. of the total production on its line. It contracts for its fuel supply with 44 operators, covering the entire output of 56 mines with an estimated daily tonnage of 23,438 tons. The large majority of these mines are located on the heaviest coal-producing divisions of the road. Approximately 14 per cent. of the coal consumed is delivered direct into the tenders of the engines. There are 17 divisions, with an average of five coaling stations to a division. The carrier owns 635 stoker-fired engines, 442 of which require a specially prepared coal, otherwise two firemen are necessary. A plan has been worked out through the use of the assigned

car whereby coal produced in a certain territory will go to the same divisions continuously, and this, it is urged, results in increased efficiency. Any change in the assignment of coal lowers the efficiency of the motive power. With the assigned car the Baltimore & Ohio used an average of about two grades of coal on a division. During the strike period in 1922 it was necessary to use about 18 to 20 different grades, and the performance of the motive power was unsatisfactory. Several hundred thousand tons were stored when the car supply permitted without interference with or affecting the commercial distribution. The Baltimore & Ohio would encourage the storing of coal if the car supply is strong enough.

The Chesapeake & Ohio consumes about 2,500,000 tons of coal annually, of which approximately 300,000 tons are loaded direct on the engine tenders and 2,200,000 tons on cars. This carrier owns mines which supply 700,000 tons, and 1,500,000 tons are obtained under three-year contracts from seven different mines. High-volatile steam coal is used practically exclusively. Coal elevators of modern type are maintained at various locomotive terminals.
101 No coal is stored, other than the small storage capacity of the bins and coal elevators, the largest of which is 500 tons. The carrier estimates that 1,400 out of a total of 42,000 coal cars owned will be constantly required for securing its fuel, although prompt dumping reduces the number of cars held daily to approximately 1,200. Contracts are confined to a few mines which produce coal efficient for engine purposes. It is contended that if the contracts were spread over a number of mines an unduly large number of cars would be required to handle the fuel contracted for; the cost of assembling would be excessive; it would interfere with transportation functions; the responsibility for filling the requirements would be divided among too many people; and it would be practically impossible for the carrier to make an inspection of the coal.

There are no mines on the Grand Trunk from which it can obtain fuel, and it is dependent upon coal produced in the United States. To insure a supply of proper grade the Grand Trunk purchased 5,456 hopper-bottom self-clearing cars at a cost of $4,320,000. With the exception of 350 or 400, these are used largely for transporting its coal. Its requirements approximate 7,000 tons daily, or a little over 2,500,000 tons annually. The coal is obtained largely from its own three mines near Bellaire, Ohio, one on the Baltimore & Ohio, and two on the Pennsylvania. About 10 to 15 per cent. of its supply is secured from mines in Nova Scotia, which is used at Montreal and points east. It has a contract with a mine on the Illinois Central in Illinois, and furnishes about 25 to 30 cars a day to the Illinois Central at Chicago for delivery at that mine. It has short-term contracts with other mines on the Buffalo, Rochester & Pittsburgh; Buffalo & Susquehanna; and Pittsburgh, Shawmut & Northern. Some of this coal is of poor quality, and equipment is not assigned for the loading thereof except to one mine on the Buffalo, Rochester & Pitts-

burgh, with which a yearly contract is made. It generally stores about 450,000 to 600,000 tons, about 90 days' supply, to guard against any slow-up in transportation caused by storm or congestion.
102 The position of the Grand Trunk is similar to that of other lines, that if it could not assign cars for its fuel it would be forced into the open market to purchase coal at an increased price, with no assurance of a steady movement of the supply.

The Chicago, Burlington & Quincy owns a mine in the southern Illinois district with a production of 4,200 to 4,500 tons per day. It consumes, on an average, about 13,500 tons per day. It contracts with other mines for the remainder of its coal. During slack periods, or when requirements are less, its own mine is closed down because the contract mines meet its requirements. It makes a general practice of storing a limited quantity, but regards it as uneconomical to store more than a reasonable amount. The estimated handling cost is about 25 cents per ton.

There is only one small mine on the Seaboard Air Line, and it obtains its coal from mines on other lines. It consumes about 105,000 tons monthly, about 40 per cent. of which is obtained from mines in West Virginia-Virginia territory on the Norfolk & Western, Interstate, and Southern Railways, and 60 per cent. from Alabama mines on the Frisco and Birmingham Belt. Its requirements are secured through part-output contracts made early in the spring for the year's supply beginning July 1. Since Federal control the greater portion of its coal has been secured without the use of assigned cars. Prior to Federal control it was the practice to assign coal cars to protect at least 75 per cent. and at times 100 per cent. of its requirements. It maintains seven operating divisions, with 23 major coaling stations, in addition to 45 smaller stations. Storage is provided at five points for approximately 100,000 tons, or one month's supply. The coal is either dumped directly on the ground or from a trestle.

The Southern under normal conditions obtains its supply under contracts covering the entire output from mines on its line in Virginia, Tennessee, Kentucky, Alabama, Indiana, and Illinois. It occasionally purchases coal for the Washington division from mines in West Virginia on the Chesapeake & Ohio and Baltimore &
103 Ohio. It estimates its requirements for the year ending January 30, 1923, as 5,871,522 tons. It endeavors to keep on hand a supply for about 20 days.

Some of the important carriers which use the assigned car for railway fuel at mines on their own lines have not presented any statement of the reasons which have impelled them to adopt or maintain the practice. Among such carriers may be mentioned the Pennsylvania, New York Central, and Louisville & Nashville. Many of the important carriers which supply cars to coal-loading railways for assignment to mines located thereon have not submitted any statement as to their particular situations.

The position of the opponents of the assigned car for railway fuel may briefly be summarized as follows: (1) The practice reduces the car supply at commercial mines on certain divisions, since the assigned cars are taken into account in determining the number of cars to which each division as a whole is entitled; (2) it results in a wastage of cars, because a mine loading assigned cars usually has more cars standing over than a mine loading commercial coal; (3) it produces great and harmful inequalities in working time in nearby competing mines; and (4) it affects the price of the coal purchased by the carriers injuriously to the mine operators, and that it results in the shipper buying transportation preference with coal, and the carrier buying coal with transportation preference. The contentions will be dealt with separately.

The effect of the use of the assigned car for railway fuel is to diminish to some extent the supply of cars placed at commercial mines during periods of car shortage. The extent to which the practice causes a diminution in supply is in dispute; the mine operators opposing the practice consider it a serious matter, both because of its direct effect in limiting production and because of the indirect effects upon their costs and labor supply, while the carriers minimize the result and even claim compensating advantages to the commercial mines because of the practice. Because of the wide differences
104 in the practices of the railroads, and the many fluctuations due to changes in car supply, public clamor for coal, or service orders of the commission, it is extremely difficult to state in precise terms as to a division of a particular line what would have been the effect on the distribution of cars to commercial mines had no cars been assigned; and it is even more difficult to express in any arithmetical manner the result as to the carriers generally. There is much in the record on this subject, which must be weighed in the view of countervailing considerations. The estimates based on individual judgment in some instances indicate the increase in the commercial distribution would have been almost 40 per cent, at the height of the car shortage of 1922. Other testimony indicates a difference of from 10 to 30 per cent. Evidently the private assigned car figures in these estimates, as well as the railway fuel cars. The last column of the following table indicates the increased supply which commercial mines in the various districts on the Chesapeake & Ohio Railway would have received during the year 1920 if there had been a pro rata distribution of all cars—i. e., commercial, system fuel, foreign fuel, and private:

	New River district	Kanawha district	Coal River district	Logan district	Kentucky district	Total
Unassigned cars placed, per cent of aggregate orders	*Per cent* 56.4	*Per cent* 59.9	*Per cent* 51.3	*Per cent* 61.9	*Per cent* 58.1	*Per cent* 57.1
Per cent of aggregate orders if all cars prorated	58.7	58.8	58.9	58.9	58.4	58.9
Increase in cars placed, if all prorated, per cent of aggregate orders	4.3	3.7	4.4	3.9	4.3	4.9

In times of shortage, with a strong demand for coal, the orders may be taken as approximating the mine ratings. The percentages now to be quoted are in terms of the aggregate orders. During this same period, on an order for 26,429.1 cars, 25,507.7 cars were assigned for development of new mines, or under service order No. 9 of this commission. If these assignments had not been made, the percentage of unassigned cars placed would have increased from 51.1
105 to 52.3 of the orders. If the assignment for railway-fuel and private cars had been abolished, and those cars prorated, the percentage would have further increased to 56. Without private-car assignments, had the private cars remained off the line, the percentage would have decreased from 51.1 to 48.5. If no assignments for railway fuel or of private cars had been made, the former class of cars being prorated to all mines and the latter being no longer on the line, the percentage would have decreased from 51.1 to 50.1. If the assignment for railway fuel had been abolished and the railway-fuel cars prorated to all mines, the percentage would have increased from 51.1 to 52.7.

The weakness of such a showing is that the orders by mines in times of shortage, taken as the base to which each of the percentages stated apply, which approximate the mine ratings, are notoriously far greater than the normal mine capacities, or the ability of the carrier to transport, or the country to consume bituminous coal, when taken in the aggregate. The ratings are merely the factors to be used in determining the relative car supply each mine is to receive, in times of shortage, whether the supply be 10 per cent. or 90 per cent of the ratings. More significant would be a comparison of the number of cars which would be placed if all assigned cars were added to those distributed with the number in fact apportioned among the commercial mines. If the second line of percentages shown in the table above be compared with the first line, it will ap'ear that the result of prorating the assigned cars (including private cars as well as those for railroad fuel) with the unassigned would have been to increase the supply of the commercial mines over the cars actually furnished by the following percentages of the cars in fact se't:

New River district	12.5 per cent
Kahawha district	11.2 per cent
Coal River district	8.5 per cent
Logan district	7.5 per cent
Kentucky district	8.6 per cent
Total	9.6 per cent

106 In considering these averages it is to be remembered that the figures cover a calendar year, during a part of which there was no car shortage. As previously explained, cars for railroad fuel were assigned by order of the United States Railroad Administration during Federal control; from March 1 to April 15, when our notice to carriers and shippers became effective, the effective car-service rules made no provision for the assignment of railroad fuel

cars. If confined to a period of time during which a car shortage prevailed, and during which the assigned-car practice was applied throughout, the percentage of increase in the supply to the commercial mines which would result from the abolition of the assigned-car practice would be greater than shown in the last preceding table. Further, as the statement covers entire fields, aggregated into single sets of comparative figures, the effect on different individuals doubtless varied. With some, the result of the change in method of apportionment of the assigned cars might be inconsiderable, but of greater importance to others than the mere statement of percentages might imply. The mines which receive a full car supply through the assignment practice are few in number as compared with the commercial mines, and the latter operates at but a fraction of their capacity. Therefore the disparity in treatment between individuals is far greater than is indicated by the process of recasting the supply in the manner indicated. The prorating of all cars equally would decrease the supply given the few mines much more in proportion than it would increase the supply of the remainder. But, if a preference exists, the fact that few receive it and that its abolition would not intrinsically greatly increase the benefits to the unfavored great majority of shippers, can not be urged as a justification.

A compilation based upon estimates made by the Baltimore & Ohio for four successive Thursdays in October, 1922, is to the effect that the commercial supply would have been increased by the following percentages of the cars placed at commercial mines, if system fuel cars had been distributed ratably with unassigned cars:[1]

Division	Oct. 5, 1922	Oct. 12, 1922	Oct. 19, 1922	Oct. 26, 1922
	Per cent	Per cent	Per cent	Per cent
Monongah	35.7	31.3	27.1	35.8
Connellsville	6.9	3.9	8.6	8.4
Wheeling	72.2	3.3	66.9	61.7
Cumberland	2.7	1.6	1.5	2.4
Pittsburgh	1.1	66.1	2.9	26.1
Charleston	4.9	3.8	13.9	7.3
St. Louis	3.0	18.6	12.9	3.4

No changes would have been made in the distribution in the Ohio River, Ohio, Toledo, Akron, and Newark divisions, as seemingly no cars were assigned in these divisions.

Evidence of bona fide contracts for the output of the mines is required by the Baltimore & Ohio before assigned cars for foreign fuel can be sent in. Approximately 25 per cent of the total cars loaded

[1] The reduction in car supply for the Cumberland division October 12 and 19 which would result if all cars had been pooled, is thus accounted for: The adjusted mine rating for assigned cars slightly exceeded the adjusted mine rating for unassigned cars. On the dates mentioned no assigned cars were placed on the Cumberland division. Including the number of cars placed, which were all on the unassigned basis, in the greater divisor gives a smaller number of cars as due the commercial mines, and brings a smaller reduction to the cars to be allotted to them. The same method of computation was employed as to the other divisions shown.

on the Baltimore & Ohio are assigned cars. On Mondays in October, 1922, had assigned cars for Baltimore & Ohio fuel been eliminated the distribution to commercial mines would have been increased to any extent on four divisions only. The increases on the system as a whole ranged from 3.23 per cent to 4.6 per cent of the mine ratings. Assuming that the average tipple mine has a rating of 10 cars per day, and that the available cars had been equally distributed, the result would have been a daily increase in the car supply at the commercial mine of approximately 0.4 car, or about 10 cars a month.

The weight to be given this showing is discounted by reason of
108 the fact that Monday is practically always the day of best car supply on any carrier during times of shortage, and the day on which the effect of the assigned car upon the commercial mine would be at the minimum. But, in view of the inability of the commercial mine operator in such times to meet the demands for coal, the diversion of an average of a fraction of a car daily is not to be waived aside because it may seem inconsiderable as compared with an average rating of 10 cars, assumed for the illustration. In fact, with but a 40 per cent car supply, the operator in the case assumed would receive but four cars a day on an average, and an increase of four-tenths of one car would be equivalent to increasing the car supply he receives 10 per cent, and would permit him to increase his output and supply one-tenth more coal to his customers.

If a foreign carrier were not permitted to assign its own cars to a coal-loading carrier, the latter would be under the primary duty of supplying cars at the mines. There would follow a reduction in the supply available for the commercial mines, because of the necessity for spreading the cars that were at hand over a wider field, unless the foreign carriers were compelled to participate in furnishing coal cars for the service. For that reason the carriers claim that such cars are a distinct advantage to the commercial operator. Whether this would ultimately be the fact must depend upon the determination of the duty of the participants in the through movement to supply appropriate shares of equipment necessary for the transportation. Without passing on the question whether the duty rests upon the carriers jointly (compare Huerfano Coal Co. vs. C. S. E. R. R. Co., 28 I. C. C. 502) or severally, in the aggregate the duty of providing an adequate supply of equipment rests upon the railroad carriers.

When a railroad company becomes a purchaser of coal upon the lines of a connection, and ships it to itself as consignee, it is entitled to the same consideration as any commercial shipper or consignee and no more, and this is true when the shipment moves partly over the
109 rails of the carrier that is in fact the shipper or consignee. (Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1 9; Divisions of Joint Rates on Railway Fuel Coal, 37 I. C. C. 265.)

There is evidence which indicates that the assignment of cars for foreign-line fuel coal to a certain extent dislocates the car supply of the coal-loading line to the injury of the operator shipping commercial coal, because of the frequent disregard of the requirement that cars of one line sent to another line for fuel must be placed at the mines to which they are carded. Some coal-loading roads place such foreign-line fuel cars at the mines nearest the junction point at which received, and then place system cars at the mines which are to ship coal to the foreign line. This usually occurs when the home line is congested. The result is a material lessening of the already short car supply of the home line, as the car-service rules require that the foreign-line cars must be loaded to or in the home direction, and an equal number of system cars go to the foreign line with its fuel. Assigned foreign-line fuel cars sometimes replace an equal number of commercial cars which would otherwise be subject to pro rata distribution. The coal-loading road equalizes its car supply among divisions, and in doing so takes into account the foreign-line fuel cars. This is detrimental to the commercial operators, since it reduces the number of cars to which they would otherwise be entitled.

The record indicates that upon the whole the wastage during periods of shortage, which results from cars set not being loaded on that day but held over, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. A scanty or irregular supply of cars to the commercial mine makes for sporadic production, while the mine with the assigned cars flowing more steadily and closer to capacity is better able to utilize with promptness the equipment received. If the commercial mine has cars left over, unloaded, they are charged as against the subsequent supply, and the commercial operator goes to every length to avoid this in times of shortage, when the price obtainable for his product is usually the highest. The assigned-car mine is under less
110 disability in this regard, and is not subject to the same penalty, because its failure to load promptly does not decrease its future supply of assigned cars. While the difference in percentage between the two classes is not great, evidently in the aggregate some thousands of cars are involved daily in periods of shortage.

All interests represented take the position that the bituminous coal-mining industry is greatly overdeveloped, and that there is a surplus of labor available for such mines. In times of plentiful car supply, or when the demand for bituminous coal is low, many small or weak mines, which are the least economical to operate, are forced to close. Car shortages are usually accompanied by a condition of alarm on the part of the consuming public, and a demand for the coal which becomes more excited as the coal-car supply lessens. This encourages the opening of the smaller and weaker mines with the recurrence of a poor car supply, and the paradox is presented that as the car supply becomes worse, the capacity of the open mines

increases at even a greater rate. This makes more difficult the process of distribution, as the cars in service can not be handled as efficiently, nor can as much coal be transported in the aggregate as if fewer mines were demanding service. The increase in demand and mine rating must be met by a pro rata distribution of the available cars, and thus the supply, already diminished because of the lesser efficiency possible in movement, is further diluted in the process of ratable distribution according to the enlarged capacity. The consequence is that in times of car shortage the commercial operators are in the keenest competition for cars. There is also a competition in the demand for cars as between users of coal. The service orders which we issued in 1920 and 1922 were based upon the insufficiency of the existing supply to meet all needs. Industries, which were less vital to the public welfare, but better enabled to pass along their fuel costs, were able to bid up the price of coal for all users, and thus attracted an undue proportion from the more essential uses, to the detriment of the convenience of the public and the commerce of the people. A shortened car supply at commercial mines, from whatever cause, tends in this direction.

111 Respondents have interpreted our decisions as permitting the assignment of cars on a day-to-day basis. Thus, on a given day a mine with a rated capacity of 20 cars loads railroad fuel, and receives 20 assigned cars, while another mine with the same rated capacity loading commercial coal is supplied but a percentage of its rating. The next day both mines load commercial coal, and are given the same number of cars. The mine loading railroad fuel on the one day has thus received more cars in the aggregate than the mine of equal rated capacity which has shipped only commercial coal. A strict construction of our decisions shows that we did not prohibit the assignment of cars for railroad fuel in excess of the percentage of cars available for commercial loading when the output of a mine was taken for only brief or intermittent periods. No time limit was imposed by us. After we issued our notice to carriers and shippers, dated April 15, 1920, and railroad fuel cars were considered as assigned cars, the possibilities of the practice were carried to the extreme in some instances and such cars were given to a mine for its entire output for a day or for certain days, and the mine was treated as on a commercial basis for succeeding or intervening days. This was an intermingling of the two ideas of taking a part of the output of the mine and counting against it the cars assigned to it for railroad fuel, and the other provision for taking the entire output of the mine. We found it necessary to exercise our emergency powers under paragraph (15) of section 1 to restrict the practice, and to make it clear that the brief or intermittent use of a mine for railway-fuel supply would not warrant the application of the assigned-car privilege. As previously stated, service order No. 18, since vacated, prohibited the assignment of cars and failure to count them against the distributive share of the mine for

the day, or assigning cars in excess of the mine's distributive share for the day, except where the entire output of the mine was taken for a period of not less than six consecutive months. After the cancellation of that order certain carriers again resorted to the
112 former practice of assigning cars for the entire output of a mine or mines for a day or for certain days, and distributing cars to that mine on the other days for commercial loading, and now follow that practice. In the rules proposed the respondents do not recommend that the application of the assigned-car privilege should be limited by a requirement that the railroad shall make term contracts for the entire output of the mines at which the assigned cars are to be placed. It is conceded that all such requirements are not so covered, and it is claimed that they can not be, and some leeway must exist within which the railroads may apply the assigned-car rule.

The opponents of the assigned car also object to the limitation of the use of the assigned car to output contracts for periods of six months or more, but on different grounds they contend that such limitation would not eliminate the evils produced by the practice, but would bring about additional evils. An operator owning only one mine would have to elect between a complete severance of all commercial connections and a complete renunciation of the assigned cars. His competitor who operates more than one mine and who is in position to continue in both kinds of business would be under no such disability. Under service order No. 18, we permitted the operator who owned a number of mines and had contracted with a carrier or carriers for the total output of one mine to assign cars at some one of the mines of the operators in the same district on different days. This, it is contended, subjects the single-mine competitor to all of the disadvantages of both the output-contract system and the partial-output system. The large operator with a number of mines, if required to confine assigned cars to the mine having an entire-output contract would probably experience labor trouble at his other mines shipping commercial coal.

Numerous operators specialize in domestic coal, and have prepared themselves for its production by the installation of proper machinery. This class of operators is essential to the supply of the domestic coal of the country. During the domestic-coal season they sell
113 the prepared sizes for domestic consumption and the screenings for other purposes. At the close of the domestic season they can not put their prepared sizes on the railroad-fuel market under the six months' contract rule, because they can not afford to enter into such a contract, and could not dispose of the screenings if they did so. The operators would thus be left with screenings which they had no way of shipping, unless given commercial cars or assigned cars for this purpose, either of which would violate the rule. The output-contract rule also involves difficulties because some roads purchase nothing but prepared sizes of screened coal, while others

purchase run-of-mine coal and screen and crush it themselves, using the prepared sizes for locomotive fuel and for the heating of buildings and the screenings in their shops.

It is the practice of certain coal-loading carriers to charge cars delivered to them by another railroad for the loading of the latter's fuel, both as assigned cars and as cars delivered under interchange arrangements. This gives the delivering line the benefit of the assigned-car rule, and also credit for delivery of equipment to the coal-loading road of the same cars. As the coal-loading carriers commonly ship a large amount of the bituminous coal they produce to points upon the lines of connecting carriers, the proper balance of interchanged cars is highly important in conserving the car supply of the originating line. The practice mentioned tends to diminish that supply, and thus decrease the available cars for commercial coal loading. We do not regard the practice as proper.

Much of the voluminous record has dealt with the practical effect of the operation of the assigned-car practice upon mine labor. The evidence is conflicting in many respects, and it does not seem necessary to state it other than generally. The mine operators are not unanimous in their opinions that the result of the assigned-car practice has been detrimental to their industry; but the great majority of the mine operators, and all the representatives of mine labor
114 who appeared are firmly of that conviction. Out of the mass of conflicting testimony it may be conservatively stated as established that the general effect of the assigned-car practice is to attract as many desirable miners as can be given employment to the assigned-car mine, and away from commercial mines, and particularly so in the unionized fields. The commercial mine has a more rapid labor turnover than the mine operating with assigned cars. Often these two classes of mines are located close to each other, and the miners paid upon a quantity basis in the commercial mines are rendered discontented when they are compelled to remain idle a large part of the time because of car shortage, while neighboring mines with the assigned cars are operating on substantially a full-time basis. This is one factor which has contributed to the unsettled labor conditions in the bituminous mining industry during recent years, and has been urged as a reason in support of the maintenance of existing wage scales or for still higher rates of mine pay. Without attempting to equalize the fortune, opportunities, or abilities of all the bituminous-mine operations or their mine laborers, it seems appropriate to consider this effect of the practice under consideration.

The result of the inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production. As it is the commercial supply of bituminous coal which is restricted by the free use of the assigned car, the increased costs are most sharply felt in coal intended for commercial consumption.

It appears of record that during the late war, with the elimination of assigned cars the Fuel Administration simultaneously lowered the price fixed on all coal 10 cents a ton. The increase in cost because of inequality in running time is largely due to the fact that many of the expenses of the mines are constant; some are reduced but not eliminated by idle time, and the amount of the expenditure eliminated by idle time is proportionately small. The relation between
115 the car supply and these costs is immediate. The weight of the evidence is that mine production costs rise because of a diminished car supply, but at a sharper rate. Without attempting to reconcile the conflicting testimony as to the amount of such increased cost, we may safely conclude that it is considerable and important, both to the mine operator and to the consuming public. In weighing the benefits the railroads derive from the assigned car, this indirect cost to the coal-consuming public must be given proper value.

The protestants contended that in return for the preference in car supply given to mines loading railroad fuel the carrier is able to secure its fuel coal at a lower cost than would be the case if the cars were distributed on a pro rata basis. The record does not support the statement more often made to us outside this record than in it that the railroads deliberately and directly use the assigned-car privilege as a means of coercing unreasonably low prices for fuel.

Mine operators prefer to have the assurance that cars will be furnished for railroad fuel coal, and a promise of this character is one of the factors which influences the making of the contract. If the operators do not have this assurance, there would be a higher price. Without doubt in many cases the assurance of a full car supply tends to bring the railroad buyer and mine-operator seller together upon a lower price basis than would otherwise be agreed upon without that factor being mentioned in the negotiations at all; in some instances the assurance of a good car supply is named or advertised as an essential consideration. For the present we need give this consideration only as it bears upon the fact previously commented upon, that the commercial-mine operator is sometimes forced out of the commercial business and is compelled by his necessities to take advantage of the assigned-car privilege and to sell his product to a different class of users at a lesser price than he otherwise would. The respondent carriers repudiate the suggestion that they seek or should be permitted to use the assigned-car privilege as a means of securing fuel coal at an unreasonably low price.

116 In the case of mines which a railroad carrier owns, situated upon its own rails, or where mines are operated under a long-term lease virtually the equivalent of ownership so far as duration is concerned, a somewhat different situation exists with respect to competition with commercial mines than when such mines are privately owned and either leased to carriers or covered by output contracts and operated by their private owners for periods of time such that

they may fairly be said to continue to be actual or potential competitors with commercial mines in the vicinity. The mine owned or controlled by a railroad carrier situated upon the lines of another railroad comes into competition with the commercial mine near by. The practical difficulties of determining whether a leasing arrangement is of such a character that it is removed from the competitive field are manifest. Should the privelege of assigned cars be restricted to mines of railroad ownership, the effect would be to encourage the railroads to buy mines and thus increase the present number of assigned cars or else to induce them to open new mines of their own membership, which would not only have the same results, but would undesirably add to the capacity of the already over-developed industry of bituminous-coal mining.

There has been much adduced bearing upon the ability of the carriers to secure their reasonable fuel requirements without the use of assigned cars. The operators contend that such needs can be met adequately by one or more of the following methods, without assigned cars: (1) By storing more substantial amounts of fuel coal at points of consumption during periods of inactive demand upon the part of the public, which, it is claimed, can be done without undue expense; (2) by a wider distribution of fuel contracts among producing mines; (3) by contracting that a certain proportion of the coal produced and to be shipped shall be carded for railroad use before deferred customers are supplied; and (4) by order of this commission suspending the applicable rules as to equal distribution in special cases of real emergency, under the powers conferred by paragraph
117 (15) of section 1 of the act. The carriers doubt or deny the practicability of these suggestions. Perhaps singly none of these suggested courses would suffice, but in combination they would greatly mitigate the results which the respondents claim would follow the abolition of the assigned-car privilege. That some other course is practicable is strongly indicated by the fact that many of the great bituminous-consuming railroads have not found it necessary to assign cars to insure an adequate supply of suitable fuel. The argument from individual necessity should not be pressed too far in this regard in the absence of a showing as to a sufficient experience in operating under the practice of equal distribution.

But the railroads are not the only agencies as to which the public interest requires that there shall be a steady supply of suitable fuel at a reasonable price. There are many important activities which labor under the same necessity as the railroads, who have not enjoyed the privilege of assigned cars, save during a few months in 1920 and 1922 when specially designated in certain individual cases by our emergency service orders, or as they may have employed private cars. Yet they have all continued to function. As illustrative, by our service order No. 23, in 1922, we classed equally with railroads other common carriers, the bunkering of ships and vessels, public utilities which directly serve the public under a franchise

therefor, street and interurban railways (some of which are competitors of the steam railroads which use assigned cars), electric power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; the United States, State, county, and municipal governments, and their hospitals, schools, and other public institutions. The needs of the Army and Navy are important. If the railroads are to continue sup'lying their fuel needs by a continuance of the assigned-car practice as proposed, there is good reason we should consider extending the same privilege to some or all of the public utilities and quasi public utilities mentioned.

118 The circumstances surrounding and subsequent to our decisions in the Traer and Hocking Valley cases are such that the practice based upon the rule there announced can scarcely be given the sanctity of long observance in considering the question of reasonableness or undue preference. We have already shown that the power of assignment during the Federal control was lodged in the car-service section of the Railroad Administration. The rule was not reestablished until April 15, 1920. On October 1, 1920, service order No. 18 further limited the rule in its application, and that order, bottomed upon the emergency powers conferred upon us by paragraph 15 (*a*) of section 1, remained in force until March 24, 1921, when we instituted the present investigation. From 1907 to the latter part of 1918, there was no general coal-car shortage throughout the country except during the latter part of 1912. The rule announced in the Traer and Hocking Valley cases was never given nation-wide application. As the rule is unimportant to the carriers in times of car surplus, it was only during the latter part of 1912, and during the latter part of 1916 and 1917, that the carriers in the eastern part of the United States relied in a material way upon the rule in the securing of their fuel. The latter car shortage disappeared in April, 1918, and upon the recurrence of a period of shortage, the Railroad Administration had ordered the abolition of the practice. Shortly after Federal control was terminated, as previously stated, we assumed control of the situation during the car shortage of 1920, due to the so-called outlaw strike, and exercised our emergency powers until the complete termination of the period of shortage. Similarly, in the recent car shortage due to combined effects of strikes of the bituminous-coal miners and railway shopmen, our special service orders and directions controlled the distribution of equipment for coal loading. Indeed, during the life of certain of our service orders in the shortage of 1922, we notified the carriers that the use of the assigned car was regarded as inconsistent with the letter and the spirit of the general

119 plan of distribution which we were seeking to effectuate.

From the beginning of the car shortage of 1916, at least, the operation of the rule has been bitterly contested and opposed by the

majority of the commercial-mine operators, and solidly by mine labor wherever organized.

The rule evolved in the early decisions was not the fruition of ripe experience. The Hocking Valley decision, as we have stated, was in 1907, and the Hillsdale case was decided in 1910. Commissioners Clements and Lane had joined in the reports and orders in both the Hocking Valley and Traer cases. In a dissenting expression in the Hillsdale case, Commissioner Lane, Commissioner Clements concurring with him, referred to the whole question of coal-car distribution as then being in a state of flux, and that on the investigation made by the commission three years before, it was brought out and clearly established that the distribution of cars to coal mines was based largely upon interest, prejudice, and pull. (Hillsdale case, supra, page 387.) Subsequent to the Hocking Valley and Traer decisions and other related cases an effort was made to establish rules which would not be open to objection on the ground of discrimination, but the rules were referred to by Commissioner Lane as tentative and experimental and not representing the crystallized experience of years.

III

We may now consider use of private cars upon an assigned basis. Much of what has been said as to the practical effects of the practice of assigning railway fuel cars, system and foreign, is equally descriptive of the results of the assignment of private cars. There are certain additional matters which require consideration. In passing, we may repeat that the assignment of private cars was not prohibited by the United States Railroad Administration.

In the Hocking Valley case we condemned the long-existing
120 practice of failing to charge private coal cars against the percentages in distribution of cars to coal-mining companies. In effect we held that private cars should be given to the mines to which they were consigned or assigned, but that they must be counted against the distributive share of the mines. If the number of such specially consigned or assigned cars equaled or exceeded the distributive share of a mine receiving them, it should have no additional cars, but if not equal to the distributive share, the mine should be given only sufficient additional cars to make up its distributive share. Our holding is thus seen to have been a marked limitation upon a practice in effect and was based upon the issue as to undue discrimination or preference.

Subsequently, in the Hillsdale case, supra, the majority of the commission said that the general theory for the distribution of coal-car equipment according to the general trend of the decisions as stated in Logan Coal Co. vs. P. R. R. Co., 154 Fed. 497, 503, "has appealed strongly to this commission as being fair, reasonable, and nondiscriminatory." (19 I. C. C. 564.) The nature of the trend was stated thus by the court in the cited case—

"The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other." (Citing cases.)

The majority insisted that the owner of private cars was entitled to their exclusive use, but held that all cars of this description must be counted against the distributive share of the mine receiving them. Notwithstanding the rule requiring *pro rata* distribution quoted by the majority as having appealed strongly to the commission as fair, reasonable, and nondiscriminatory, the report continued—

121 "Although the mine owning private cars * * * is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them."

And the majority denied the request of the complainant that the defendant be required during percentage periods to distribute all coal cars ratably among the operators according to a rating theory which we were unable to adopt.

As will appear subsequently, Commissioner Prouty dissented because, in his opinion, the majority should have gone much further than it did in wiping out inequality in the treatment of the private-assigned cars as compared with the distribution to the commercial mines.

In many cases we have had occasion to consider the nature of the obligations and rights of the owner of private cars and of the carrier which transports them upon its rails, with particular reference to the situation of other shippers who do not own such cars and are dependent upon the railroad for a supply of equipment. The development of the relation from the time when the railroads were simply toll lines and the shipper furnished his own car is stated in In the Matter of Private Cars, 50 I. C. C. 652, 656, and is well-known history. But the carriers are no longer regarded as toll lines, even as to the comparatively few privately owned cars of various descriptions which they transport. The Pennsylvania seemingly has some charter duties as to the transportation of privately owned cars, but such obligations can not defeat the power of Congress to compel equality of treatment of shippers in interstate commerce.

Commissioner Prouty in his dissenting expression in the Hillsdale case, said:

"The use of private cars is growing less, and the question will, in all probability, never be a living one. I do not, therefore, care
122 to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service."

There have been many cases in which we have considered the relation of the private car to the railroad as it affected the rate paid by its owner as compared with the rate paid by others. The parallel between preferences and prejudices in respect of rates is manifestly close with preferences and prejudices in respect of service; indeed, with a low-grade commodity such as coal, it often happens that an inequality with respect to car distribution, controlling, as it does, the quantity of production possible, is much more important to the shipper than the amount of the transportation charge he pays. Certain principles are clearly stated in our reports, running throughout from almost the creation of the commission to the present day. The private-car owner has no right to demand that his cars be transported over the lines of a carrier which has not consented thereto. The obligation of furnishing an adequate supply of equipment by statute rests upon the carrier, and does not rest upon the shipper. The duty can not be transferred to nor required of the shipper. The use of private cars by railroad carriers has been recognized by Congress, which has provided for the control of the use of such equipment by us, under the provisions of the interstate commerce act, by means of a mandate addressed to the carriers subject to our jurisdiction. We do not deal with the private-car owner as such. Congress has provided that if a shipper furnishes an instrumentality used in the transportation of property owned by him, the charge and allowance therefore shall be no more than is just and reasonable, and has authorized us to fix the maximum reasonable charge to be paid by the carrier for the use of the instrumentality so furnished. (Paragraph (13) of section 15; compare paragraph (14) of section 1.)

But the rule of Congress goes further. The term "car service," as defined in paragraph (10) of section 1, clearly includes the supply and movement of private cars. By paragraph (11) it is made the duty of the respondents to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. By paragraph (14) we are given jurisdiction to establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to the act, including the compensation to be paid for the use of any car not owned by the carrier using it.

123

Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation. Throughout we have recognized that when the carrier permits the use of the private car upon its rails, it is responsible for the manner in which the service is conducted in that car, and that the car becomes in all respects as if it were one of the general stock of

those owned by the carrier; and subject to the same liabilities and responsibilities as to the use in interstate transportation.

The position taken by the courts and by this commission was well summarized in the report made by the committee on car distribution and car shortage to the National Association of Railway Commissioners in the promulgation of the uniform demurrage rules, in 1909.[1] The committee was composed of a representative of each State that had a railroad commission, and Commissioner Lane of this commission.

"It is the carrier's duty to furnish all facilities of transportation, and it can not permit the presence of any equipment upon its line to work a discrimination as between shippers. * * *

124 "When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after the transportation is concluded, it leaves the carrier's service. * * *

"The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee.

* * * * * * *

"A car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight."

The language quoted was cited by us in Procter & Gamble Co. vs. C., H. & D. Ry. Co., 19 I. C. C. 556, 559, where we held the private car liable to demurrage charges, even when on the tracks of the owner. The decision was sustained in Procter & Gamble vs. United States, 225 U. S. 282. In the margin we refer to some additional decisions in which the principles stated have been given application, generally in matters relating to equality of rates.[2]

After the Hocking Valley case and subsequent decisions to the same effect, the ownership of private coal cars gradually declined until about 1916. But the prophecy of Commissioner Prouty was not borne out by subsequent events or by present tendencies.

125 Under the impetus of the war demand for coal and prolonged coal-car shortages, the ownership of private coal cars increased. There can be no doubt the incentive was the more regular and larger car supply provided under the operation of the

[1] Proceedings of National Association of Railway Commissioners for 1909, page 214. The first paragraph quoted was taken from the report of the committee on car distribution and car shortage of the preceding year. Id., 1908, page 139.

[2] Scheibold vs. L. S. & M. S. Ry. Co., 2 I. C. C. 90; Worcester Excursion Car Co. vs. P. R. R. Co., 2 I. C. C. 577; Rice vs. W. N. Y. & P. R. R. Co., 4 I. C. C. 121; Shoenberg vs. D., L. & W. R. R. Co., 4 I. C. C. 630; Independent Refinery Assn. vs. W. N. Y. & P. R. R. Co., 5 I. C. C. 415; Truck Farmers Assn. vs. N. Y. R. R. Co., 6 I. C. C. 295; Carr vs. N. P. Ry. Co., 9 I. C. C. 1; Battle vs. P. M. R. R. Co., 13 I. C. C. 179; Pennsylvania Paraffine Works vs. P. R. R. Co., 34 I. C. C. 179; and Armour & Co. vs. P. P. & W. Co., 52 I. C. C. 240.

assigned-car practice. The following statement shows the number of privately owned coal and coke cars as of January 1, 1913, and for each year from 1916 to 1922:—

Year.....	1913	1916	1917	1918	1919	1920	1921	1922
Cars.....	24,140	14,789	14,879	16,363	20,481	18,455	28,401	27,827

The record indicates that the increase in the ownership of the private cars within recent years has largely been on the part of the public utilities, the steel plants, and the by-product gas producers, many of whom sell their gas directly or indirectly for public consumption. With each of these classes of owners, steadiness of production is highly important; they are large users of specialty forms of coal, frequently of a high grade, and often compete keenly among themselves for the coal of certain preferred varieties found in particular fields. It is significant that the fuel cost is either passed on directly to the customers of this class of users, or is capable of absorption in the manufacture cost. The consequences of the assignment of private cars are more strongly felt in certain localities than in others. On some railroads the question is relatively unimportant. Upon certain divisions of the Pennsylvania, the Louisville & Nashville, and the Chesapeake & Ohio the private cars are a considerable proportion of the whole. It is abundantly made clear from the record that as competition becomes more keen more and more the public utilities, steel producers, manufacturers of by-product gas, automobile manufacturers, certain chemical manufacturers, glass works, and other industries likewise absolutely dependent upon a steady supply of coal, rather than face ruin each recurring coal-car shortage, will be compelled to acquire private cars which they may have assigned. The result is not only an increasing gross inequality between users of this form of equipment who are able to afford the very considerable expense in procuring and maintaining such equipment, reflected immediately in the disproportion between the amount of their output or consumption as the case may be, but also that the available facilities of the railroad carrier other than cars—locomotives, tracks, and terminals—are taken up in great degree by such classes of preferred uses, so that the commercial mines are and will find themselves unable to procure transportation for even the ratable share of the cars which the carrier owns and sets for them. If the practice is continued, it is not too much to expect that in future periods of car shortage due to insufficient motive power, strikes of maintenance-of-equipment employees, and like causes, the scramble for coal on the part of users who can afford to pay the price will lead to the effort to assign privately owned locomotives and train crews privately employed in the manner in which privately owned cars are now assigned. During the car shortage of 1922 we received requests to this effect.

The following statement shows the number of days worked during the year 1920 by certain mining companies owning private coal cars

and the average number of days worked by all bituminous coal mines within the State of Pennsylvania, including the assigned-car mines:

Operator	County	January	February	March	April	May	June	July	August	September	October	November	December	Total
Berwind-White C. M. Co.	Cambria	24	20	21	21	24	24	20	20	21	23	19	15	256
Do.	Clearfield	22	15	18	19	19	17	15	16	7	17	17	11	197
Do.	Somerset	24	20	26	23	25	25	23	20	23	23	23	25	282
Maryland Coal Co. of Pennsylvania.	Cambria	23	24	25	24	26	25	20	23	23	26	26	26	301
Penn-Mary Coal Co.	Indiana	24	17	23	23	19	20	21	23	20	20	20	20	271
Union Coal & Coke Co.	Washington	26	24	26	24	24	23	23	23	24	26	24	24	294
Westmoreland Coal Co.	Westmoreland	17	16	19	16	17	19	19	20	22	23	24	25	239
Average all bituminous companies in State.		19	17	20	17	17	19	19	20	20	20	19	19	233

Another complaint of the protestants is that privately owned cars enjoy the use of a disproportionately large part of the facilities of the carriers. During 1920 the operations of the United States
127 Coal & Coke Company on the Cumberland division of the Louisville & Nashville Railroad had a rating equal to one-sixteenth of the entire rated capacity of mines on that division, and their private cars used for their coal loading received one-eighth of the use of the transportation facilities. Users of private cars received 100 per cent. of their requirements regardless of the shortage of motive power, while unassigned mines received a much lower percentage because of the inequitable distribution of such power. The private-car owners assert that such preferential service can only exist when there is a general shortage of railroad facilities other than coal cars, such as the conditions brought about by the railroad shopmen's strike which became effective July 1, 1922.

The practices of the carriers differ. The Pennsylvania apparently permits the owner of the private cars to place its cars for the owners loading at any mine the owner designates, even though such loading be for one day only. On the Chesapeake & Ohio, on the other hand, the placement of cars for the owners loading at mines other than those owned by him is permitted if regularly continued for a considerable period. But where the assignment is merely occasional the placement of cars is made on the same basis as system cars. Any overplacement of private cars at a mine on one day is subsequently adjusted to effect an equal distribution as between all mines. The Norfolk & Western does not handle private coal cars on its line. The Illinois Central favors the private coal car because it reduces the necessity of railroads furnishing themselves with equipment to take care of the gross volume of business that ordinarily they will be required to take care of in their own cars. The United States Steel Corporation owns a large number of private coal cars which are loaded at mines on the Illinois Central. The cars are delivered to the

Illinois Central by the Elgin, Joliet & Eastern in train lots, and after the cars are loaded they are returned by the Illinois Central in the same manner.

The record indicates that during 1920 and the summer of 1922 certain carriers, particularly the Pennsylvania, Chesapeake &
128 Ohio, and the Louisville & Nashville, accorded to private-car owners a greater use of their facilities than they should properly receive. The extent to which this was done, however, is not clearly established of record. The conditions of the past year were abnormal. The carriers' locomotives, due to the shopmen's strike, were in poor condition. The strike in the bituminous coal fields made a heavy demand for coal from the nonunion fields, a large part of which are located upon the lines of the three carriers mentioned, and taxed the carriers' facilities. The termination of the coal strike increased the demand for coal, with a resulting greater burden upon the carriers' already overtaxed facilities. In the congestion, when the carriers were unable to transport promptly all traffic offered them, certain of them did prefer the handling of private cars from motives of convenience. These cars were usually moved in train lots in shuttle service, and avoided the additional switching and spotting service necessary in furnishing a like amount of transportation to the numerous mines shipping commercial coal in system cars. The abnormal conditions of the summer of 1922 illustrate the natural effect of the assigned private-car practice under conditions which should call for the utmost consideration of all shippers in order that the transportation disabilities of the carrier should be borne as equally as possible. Coal in private cars under the present arrangements is susceptible of easier movement than similar shipments in railroad cars because it usually moves regularly between the same points in large or trainload lots. This merely indicates the greater likelihood that such cars will receive preferred treatment.

There are other practices of some of the carriers in the handling of private cars which are not free from criticism. We have in mind particularly the placement for the private-car owner of its own cars at certain mines to be loaded with coal for the owner's use from day to day and the placement of system cars at the same mines on alternate days; if on the days on which such private cars are placed they exceed the pro rata share of cars to which that particular mine would be entitled if dependent wholly upon system cars, no
129 subsequent adjustment of such average is made. Any attempt on our part to mitigate the bad effects of such a practice is but temporizing. The private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars or he is entitled to no preference whatsoever on account of that ownership, and a compromise is untenable.

The owners of private cars contend that such cars are essential to insure a regular and adequate supply of coal; that the cars were purchased only after all other remedies had been exhausted and

that it was the only method whereby their coal requirements might be met, except by the assignment of cars on order of the Government. It is claimed that the use of private cars during car-shortage periods releases railroad cars for strictly commercial mines, which otherwise would have to be placed at private-car mines. This overlooks the fact that particularly in times of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more important to him than a slight addition to his allotment, effectuated by giving his neighbor and competitor a better car supply. Except during car-shortage periods the investment which these owners have made, estimated at approximately $80,000,000, is of no practical utility to them. The mileage allowance paid by the carriers for the use of private cars, which is sufficient when the cars are employed in transportation service, is not adequate compensation for ownership when there is a car surplus. But the investment was voluntarily made by persons not common carriers.

Congress has given the coal consumer a right to demand that adequate transportation facilities be provided by the railroad carriers, and has afforded a remedy for the enforcement of that right. We are now prosecuting an inquiry upon our own motion, No. 14489, under the provisions of section 1 of the act, as to the adequacy of the facilities for the performance as common carriers of car service by each of the railroads subject to our jurisdiction, with a view
130 to making an order requiring the respondents to provide themselves with such safe and adequate locomotives and cars as may be warranted by the facts as shown, and as required by law. This power upon our part, and remedy afforded to the shipper, first came into the interstate commerce act as one of the amendments made by the transportation act, 1920. The change in the law differentiates the present case from all those in which the assigned-car rule was developed, as prior to February 28, 1920, we had no power to require a carrier to provide itself with reasonable facilities such as equipment, no question of discrimination being involved. United States vs. Pennsylvania R. R. Co., 242 U. S. 208.

Upon the facts shown of record we find and conclude that in the distribution of cars for transportation of coal among the bituminous coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is, and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential

of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars,
131 whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall preclude the commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

There appears to be no reason for the continuance of the investigation as to carriers serving solely anthracite coal mines, and the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, will be discontinued.

We will enter an appropriate order, effective September 1, 1923.

EASTMAN, Commissioner, concurring:

I concur in the majority report, except as to the conclusion "that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act." Paragraph (12) contains this provision:

"During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count *each and every car* furnished to or used by any such mine for transportation of coal *against* the mine. [Italics mine.]"

I am unable to escape the conclusion that it was the intent
132 and is the meaning of this provision that in times of car shortage every mine should be limited to a pro rata share of the available car supply, and that in computing this share every car furnished to the mine, whether private car or railroad-fuel car or car for commercial loading, should be counted. Under the assigned-car practice now in effect, however, it appears that the number of such cars placed at a mine may, and often does, exceed its pro rata share of the available car supply. It does not seem to me that in such

cases the cars are being counted "against" the mine. The purpose of paragraph (12), as stated by the House committee when it was reported, was to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars.'"

I am aware that this view is not in accord with the opinion expressed in Assignment of Freight Cars, 51 I. C. C., 760, a report in which I joined. It is a view, however, reached after more consideration than I was able to give to the question at the time of that ex parte report.

I am authorized to say that Commissioner Campbell concurs in this expression of opinion.

HALL, Commissioner, dissenting in part:

I concur in the conclusion of the majority that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act, but must dissent from the findings of unreasonableness and undue prejudice.

The car-distribution rules condemned by the majority are those prescribed by us more than 15 years ago. Our orders prescribing them were upheld by the Supreme Court of the United States. We then recognized that a carrier by railroad has the right to secure its fuel supply either from mines which it owns or from mines the entire output of which it purchases; and that if its contracts for fuel cover such supply as it reasonably needs for current operation it can use its equipment to procure its fuel even though operators of commercial mines are thereby deprived during periods of car shortage
133 of some cars which they would receive on a strict prorating of the available supply. In other words, we found that this use by a rail carrier of its cars did not constitute an unjust discrimination or undue prejudice prohibited by the act. It is well settled that mere difference of treatment does not constitute unjust discrimination or undue prejudice. The right which we found to inhere in a rail carrier has not been abridged or denied by subsequent legislation. It rests upon the fact, elementary, fundamental, and partaking of the highest public necessity, that a railroad must have an adequate supply of fuel in order to supply the people with adequate transportation. This, of course, means that a railroad must have a reliable, steady flow of coal, of even quality best suited to its different needs, at reasonable cost.

The majority take away this right and brush aside the public necessity. They substitute nothing which will protect either the public servant or the public served. In focusing their attention upon the commercial-mine operator they seem to lose sight of the entire traveling and shipping public, as well as the myriad industries dependent upon transportation, all entitled to as much consideration as the producer of coal when the issue of unreasonableness or undue prejudice is raised. In effect, although not in intent, their findings subordinate the needs and interest of all others to those of the coal industry. But even in that restricted field it little profits to compute

the fractions of a car which uniform prorating would add to the daily supply of a commercial mine if the carrier lacks power to place the empties or haul away the loads. Again, it is said that the commercial coal goes in part to public utilities of various kinds whose needs are as great, and impressed with a public interest as great, as those of the railroads. That is true, but the difference is that the railroads reach the mines and the other utilities do not. Before they can use the coal the railroads must bring it to them. Therefore in their interest, and that of the public they serve, the supply of fuel for the railroad service comes first in importance as well as in time of use.

134 Until now the commission has recognized that fuel was as indispensable to the rail carrier as the rail or ties or roadbed or cars or locomotives, not at some times merely, but at all times, if the public is to be adequately served. The duty of the common carrier is to carry for all who offer, "unless his coach be full."

Use of the assigned car and the private car is not ideal, but it is at least practical, has been tested in times of stress, and no workable substitute therefor has been developed or is now prescribed. The alternatives left are confiscation by the carrier or priority orders by us. Is not this a recognition in another form of the public necessity that the carriers must have fuel in preference to other consumers? The majority would reserve to the commission the right to direct a discrimination in the distribution of cars which it condemns as unlawful when practiced by the carriers. Can it be said that the preferential assignment of cars under orders of the commission will not tend to bring about the very conditions in the coal-mining industry for which the assigned-car practice is here condemned? The harm, if harm there be, to the industry will be just as serious if brought about by a series of service orders as if brought about by application of the general rules prescribed and sanctioned by us and now in effect.

Respondents propose to include in their definition of assigned cars the words "and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission." This is not condemned by the majority. But the treatment of private cars, and cars assigned for railroad-fuel loading in accordance with our cited decisions, is condemned as both unreasonable and unduly preferential. If unreasonable, how can we by priority orders make the same treatment reasonable? Our power under section 1 (14) is to establish reasonable rules and practices with respect to car service, and under section 1 (15) in time of emergency, to make such just and reasonable directions with respect to car service as in our opinion will best promote the service in the interest of the public and the commerce of the people.

135 We are not given carte blanche, at discretion, to do anything or everything which may occur to us. The Congress has provided the yardstick. What we direct must be just and rea-

sonable and in the public interest. It follows that we can not, even in time of emergency, direct what we have deliberately found and declared to be unjust and unreasonable. If and while the finding of the majority stands unreversed it is difficult to see how the commission can relieve lack of railroad fuel by priority orders.

This brings me to what I regard as the fundamental misconception of the majority. They condemn the maintenance of rules which tend to cut down or eliminate altogether so-called car shortage, and occupy themselves with expedients for ameliorating the effects of car shortage, when it comes. Car shortage is frequently not so much a lack of cars as of power. That was true in 1922. Car congestion, also, is largely due to lack of power. For power an adequate supply of proper fuel is indispensable. The rules proposed by the carriers tend to prevent recurrence of emergency. Priority orders deal only with the emergency after it has come. It will be conceded that the railroads as producers of coal for their own use, as purchasers of coal for their own fuel use, and as consumers of that coal are not subject to sections 1 or 3 of the interstate commerce act, or to regulation by us based on those sections. However, profoundly their consumption of 28 per cent of the country's annual product of bituminous coal may affect mining fields, or individual operators, or mine labor, it is not for us to say that what they may do as such producers or purchasers is unjust, or unreasonable, or unlawfully discriminatory. It is only when they use instrumentalities of interstate commerce in moving that coal, if their own, or engage in common carriage of it for each other, that they become subject to these provisions of the act, because in their capacity of common carriers they must use their instrumentalities for the equal benefit of all who seek common carriage without undue preference or prejudice to any. As common carriers, then, and only
136 as common carriers, are they before us in this proceeding, even though any one of them, in moving its own coal for its own use from origin to destination on its own line, is not engaged in common carriage. And this is so because it is using instrumentalities of common carriage in the movement.

We must therefore dismiss from our thought all consideration of the effect upon the mining industry of carriers' operations as producers or purchasers of fuel, and confine ourselves to what the carriers do in and about moving that fuel, bearing in mind that we have no power under the act to take away from any carrier its rights. It has the right and it is its duty to secure an adequate supply of fuel. That can not be denied or taken from it. The public has the right to a transportation machine fully protected and able to function at all times. That right is not fully protected by service orders from us after an emergency has arisen. The task of hauling and distributing railway fuel drawn from many mines is complex and of exceeding difficulty. Because of the varying qualities and characteristics of different coals the efficiency of fuel is easily im-

paired, with a resulting direct loss in efficiency of the equipment. Obviously the modern locomotive can not burn to advantage every kind of coal that is fed into it. The fuel used in a stoker-fired locomotive is not the same as that used in a hand-fired locomotive. Many instances of the different uses to which railway fuel is put could be mentioned. But certainly the public must have regular, continuous, and ample service. If the fuel supply fails, the service fails; if the fuel supply deterio'ates, the service deterio'ates. Whatever the cause, the effect is immediate. Much harm could be done before we could find that an emergency existed which called for the exercise of our extraordinary powers and before whatever orders we issue could become effective, even if such orders were reasonable and would remedy the situation.

The public interest requires that carriers should manage
137 their properties in an economical and efficient manner. It certainly can not be contended that to abolish the present practice of the Baltimore & Ohio, for instance, as set forth in the majoity report, will be conducive to economical and efficient operation.

Under our statutory power we recently authorized a loan from the United States Treasury to an important carrier, which has practically no coal mines on its line, to enable it to secure 1,000 coal cars. These cars were desired and needed to handle fuel coal for the carrier because of the unreliability of car supply on the originating lines. If the majority report is right, the carrier was unwise and we were improvident. This carrier had placed orders for fuel last year with the mines which depend upon the originating lines for cars. The carrier was forced because of defaults under its contracts to go into the open market and purchase 300,000 tons of spot coal at prices which averaged $1 per ton in excess of the contract price.

Beyond all shadow of doubt, what we are here doing will substantially increase the fuel cost of the carriers. The public must pay that cost. In busy times the forgetting of contracts has not been unknown in the coal industry. Carriers are then forced into the spot market and compelled to pay very high and in some instances extortionate prices, or else resort to that evil of evils, confiscation, which brings in its train an ultimate adjustment at the top price. These are not mere speculations of what may happen. We know from experience that they have happened and must happen again when carriers are denied recourse to the only effectual preventative.

The assigned car enables the railroad to select its coal to meet its various needs, permits the concentration of purchases and policing as to qu'ity as well as the assembling and handling at minimum expense, and guarantees delivery. It also results in regular mine operation, steady employment of miners, reliable supply, and thereby in lower costs. The ultimate effect is efficiency and economy.

This is obviously in the public interest. Whether the as-
138 signed car is for the greatest good of the greatest number is apparently of no concern to the operators who assail it.

Much of the opposition to the assigned car is based upon its effect on mine labor. It is not for me to point out the shortcomings of the coal industry, overdeveloped as it is, with thousands of mines so situated that they can only be operated at a profit when there is a runaway market. An adequate all-the-year-around supply of transportation would leave many of those mines permanently closed, and naturally their operators become the stormy petrels of the industry. The record shows that in six years the number of mines, not including wagon mines, grew from 3,669 in 1916 to 8,722 in 1921. The term "car shortage," as used by coal operators, is usually applied with reference to the capacity of the mines. That capacity far exceeds the annual consumption or demand. Whatever may be the troubles of the coal industry they can not and will not be remedied to any appreciable extent, if at all, by the action of the majority.

In Assignment of Freight Cars, 57 I. C. C., 760, 766, we said what is as true to-day as it was then:

"No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than laid down by the commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under Federal control and the production, distribution, and marketing of coal was under a war-time Federal administration.

* * * * * * *

"Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a de-
139 pendable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rule to which some objections have been made. No one has suggested such a substitute rule."

Thus far I have dealt chiefly with railroad cars assigned for railroad fuel. Private cars are included in our former decisions as in the rules which respondents now propose. Some of the operators own and use private cars, and perhaps for that reason the attack upon the private car is not as concerted or vehement as upon the assigned railroad car. My brother Daniels truly observes that the private car is not an outlaw. At this stage of our rail development and equipment it serves a useful purpose.

Everything in this record tends to show that the private ownership and control of coal cars results in greater economy and more efficient use, and, of course, the whole public is to that extent benefited. Here as elsewhere throughout this proceeding we should heed the paramount interest of all classes of shippers, the railroads, and the entire public, and not let those interests be obscured by the de-

mands of one class of producers. Acting under what has heretofore been a right, recognized by statute and by us, shippers, particularly those who are given preference in our service orders, have tended more and more to equip themselves with their own coal cars. This should be encouraged, for, if many shippers would provide their own cars, the carrier equipment available for others, particularly the smaller shipper, would be greatly increased, car shortages would be reduced, the necessity for service orders would be lessened, and thus the public interest would be served to a substantial extent.

In our report in In the Matter of Private Cars, 50 I. C. C. 652, at pages 672 and 673, we said:

"For more than 30 years privately owned cars have been extensively used to transport commodities in interstate commerce.
140 They came into use originally because the railroads would not, or did not, supply them in sufficient quauntities to meet the demand. * * * If private ownership or control of cars of particular types results in greater economy and more efficient use, the whole public is to that extent benefited.

* * * * * * *

"In the beginning carriers could not doubt have insisted upon their right to furnish all equipment. They did not do so, and in the course of years there has grown up a system of private ownership of such magnitude and importance that it must be reckoned with as an existing condition. * * *

"The system of the use and supply of private cars that now exists can not be at once and radically changed without serious consequences to shippers, carriers, and the public."

The power to tax is the power to de roy. Not so with the power to regulate. It should be used to throw about the use of assigned cars, including private cars, such proper precautions and restraints as will promote the public interest, but not to do away with the use itself for all practical purposes. We are dealing with the rights and duties, as well as the imperative needs, of the great transportation systems upon whose adequate functioning the welfare of the whole country depends. The majority by its finding of unreasonableness in what the carriers do to forestall impairment of car service throws open to challenge the reasonableness of such priority orders as the commission may put forth in future attempts to ameliorate that impairment when it comes; and by its finding of unlawful discrimination condemns the exercise of a carrier's right, instead of surrounding it with appropriate safeguards against abuse. Subject to such safeguards, which can readily be prescribed from the record now before us, the rules proposed by respondents are to my mind founded on reason, fortified by experience, abundantly justified by public
141 need, and free from unlawful taint.

For the reasons which I have endeavored to indicate, as well as for others well expressed by my dissenting brethren, I am unable to concur in these findings of the majority.

DANIELS, Commissioner, dissenting:

I concur in the report so far as it construes paragraph (12) of section 1 of the act.

I am unable to concur in the finding that the present practice of assigning private cars and system or foreign-line cars for railway fuel to bituminous-coal mines is unjust or unreasonable or unduly or unreasonably prejudicial.

My reasons for withholding my concurrence in the report's finding may be summarized as follows: First, the right of a common carrier to obtain fuel for carrier purposes is based on such paramount necessity that the assignment of cars to mines whose entire output is taken by the carrier, even though such assignment of cars disregards a pro rata allotment of open-top equipment among all mines, is not unduly preferential of the carriers or prejudicial to the shippers of commercial coal. Unless the carriers obtain sufficient fuel of the character best suited for effectively moving their locomotives, it is apparent that efficient and economical operation is rendered difficult or impossible. The resort by carriers generally to the use of the assigned car would indicate that their experience demonstrates that this system is the most effective, efficient, and economical to attain the end sought. Nor am I persuaded that the abolition of the practice under the present rule will have any other effect comparable with the increased price of fuel to the carriers and a consequent increase in the cost of transportation. I am not persuaded that the abolition of the present practice will appreciably reduce the net cost of mining or moving commercial coal. New England carriers testify that the abolition of the practice will require a doubling of the amount of coal currently stored. Such augmentation of storage will absorb for railway fuel use an additional number of open-top cars. It will saddle New England carriers with an additional cost per ton for the additional amount of coal they
142 will have to store. It will augment the per diem and car rental. The same or similar effects may be anticipated in all regions of the country. Every additional car absorbed for the supply of railway fuel will lessen to the same degree the number of open-top cars available for general commercial use. It is argued that the abolition of the rule will permit an increase in the working time of commercial mines. The possible increase is, in the first place, not great quantitatively. It may amount to three days per month. There will be a corresponding diminution in the working time of the mines supplied now with assigned cars. The diminished overhead expenses per ton in the first instance will be offset by the increased overhead expenses in the second. Moreover, it must be borne in mind that, except in periods of shortage of open-top equipment, there will still continue a difference in the working days per month between mines which secure large contracts covering their entire output and other mines which are not equally successful in making similar contracts for the disposition of their coal. When it

is remembered that, taking a period of 10 or 20 years, the number of months in which there is a shortage of open-top equipment is a very small percentage of the total time, it would appear that the collateral effect of equalizing working time between commercial mines and assigned-car mines in the period of shortage of open-top cars will be in the long run almost negligible. The report properly indicates that the basic difficulty in the coal situation is the overdevelopment of bituminous mines and the vast potential oversupply of current requirements. This fundamental difficulty will persist despite the abolition of the assigned-car rule.

In short, so far as railway fuel is concerned, the assigned-car rule has proved on the whole a workable means of affording an adequate fuel supply of the proper quality and at a low price per ton. The revocation of the rule, in my judgment, will jeopardize the regular supply of dependable railway fuel; it will make for increased locomotive failures by reason of the inability of the carriers to obtain the grade of fuel which is most efficiently employed; it will augment the price of railway fuel without appreciably affecting
143 advantageously the price of commercial coal, and it will render inevitable, in times of emergency, a resort to emergency orders carrying priorities which in essence are an admission of the necessity and utility of the present practice.

So far as the supplying of connecting carriers with coal is concerned, many of the considerations outlined above will apply. These connecting carriers on whose lines coal in sufficient amount is not mined now own open-top equipment which they may in part allot to other uses upon their own rails and thereby make an additional draft upon the open-top equipment of the carriers upon whose lines coal mines are located. Such a withdrawal will tend only to lessen the pool of open-top equipment now available for the movement of coal traffic generally.

So far as the so-called private cars are concerned, the situation is slightly different, although I am not persuaded that the abolition of the present practice will result in any advantage to the public generally or to the ordinary shippers of commercial coal. With the violent fluctuations in the coal demand as between periods of intense industrial activity and periods of industrial depression, it is perhaps questionable whether the railroad carriers can be reasonably expected to have ready at all times open-top equipment of their own ownership capable of carrying the peak load. Many private cars have been provided by their owners for just these periods of peak demand. They have thought it wise policy to make the investment to an aggregate amount of something like $30,000,000 rather than to risk their coal supply upon available equipment of carrier ownership or to confront the necessity of having to pay spot prices for coal in a runaway market. The abolition of the present practice limits the availability of these private cars for transportation purposes. For example, a public utility may turn over to a carrier 100 cars for

placement at mines where the utility owner has contracted for the entire output. At present all of these cars would be placed at the mine, and, if the output suffices, they would all be immediately loaded and moved. My understanding is that, under the
144 change in the rule, while these private cars would have to be placed eventually at the designated mine, only the mine's ratable proportion could be moved at a time when there was a general shortage of open-top equipment. If the shortage amounted to 50 per cent, then half of these privately owned cars are required for the time being to stand idle on track and may not be moved except in accordance with the rule that assigns all open-top equipment to all mines in proportion to their respective ratings. How such a withholding of these cars from the work of transportation, even though for a temporary period, can benefit the public generally I am unable to see.

It should also be remembered that the private car under the law as it now stands is not an outlaw. The act contemplates the furnishing of service and of facilities by the owner or the shipper of freight. Section 15, paragraph (13), provides that:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, * * * determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished * * *."

Clearly, private cars are an instrumentality.

In our report In the Matter of Private Cars, 50 I. C. C. 652, 672, we say:

"An amendment to section 1 of the act, approved May 29, 1917, provides as follows:

"'The commission shall, after hearing, on a complaint or on its own intiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car
145 not owned by any such common carrier, and the penalties or other sanctions for nonobservance of such rules.'

"The Congress has thus recognized the use of privately owner cars in transporting the commerce of the country, and has provided for their control by the commission through rules and regulations of carriers hauling them."

The warrant for the carriers' use of such an instrumentality is found in the act. For us to make a finding which shall in effect restrict, or cripple, or prevent the use of such an instrumentality appears to me to defeat the plain expectation of the Congress expressed in the section above quoted. It may even be suggested that such action on our part offends against the constitutional protection thrown about private property. It is urged that private coal cars

now absorb a disproportionate share of carriers' power and rails. But the legalized use of instrumentalities furnished by shippers implies the right to use a commensurate share of carrier power and tracks. Some of these private owners of open-top equipment utilize such equipment as a daily necessity in carrying on ordinary industrial operations where a steady supply of coal is absolutely indispensable. Other owners of private cars are public utilities supplying gas, electricity, and local transportation. Where concerns of either character, in reliance upon the lawful use of private equipment, have made substantial investments therein, I question the wisdom as well as the legality of impairing the serviceableness of such equipment by substituting the practice carried by the majority report. In the long run, it will amount to the unsatisfactory substitution of hastily issued emergency and priority orders whose effectiveness will be less than that secured through adherence to the present workable arrangement.

In outlining the above objections to the majority report, I am free to say that many of the abuses connected with or attendant upon the assigned-car rule might be properly controlled and virtually
146 eliminated. I think, however, that the remedy proposed is likely to prove far worse than the difficulties experienced under the present practice.

Potter, Commissioner, dissenting:

While the expressions of Commissioners Hall, Daniels, and Cox seem to me sufficient to condemn the conclusions of the majority report which are adverse to the use of assigned and private cars, the subject is of such importance that some elaboration may be justified.

Under the guidance of prevailing decisions, which I think we should follow, I accept the conclusion that paragraph (12) of section 1 of the interstate commerce act does not prohibit the use of assigned or private cars, even though pro rata distribution of all equipment is not observed and that we are authorized to sanction their use under proper restrictions. The question is whether under any circumstances and how they should be used where pro rata distribution is not observed. It is, perhaps, unfortunate that private cars for handling commercial coal and company and foreign railway-fuel cars are condemned together, for they are very different.

To my mind assigned and private cars perform essential functions which can not be accomplished without them. They are instrumentalities which can be used in correcting what is perhaps the most unsound condition in the industrial and commercial life. To forbid their use, if we have the power, will not be in the public interest.

In my opinion, if the majority report properly construes paragraph (12) of section 1, we have no authority to prohibit the advantages of assigned and private cars by requiring their pro rata distribution, although we may reasonably regulate their use. There is ample precedent for the use of the assigned and private car. In

the early history of railroads all cars were owned by shippers. The charters of some railroads now obligate them to haul private cars.

If a carrier desires so to do, there is nothing in the law which
147 prohibits it, or gives us power to prevent it, from making proper arrangements, though tariffs if need be, with a view to hauling private cars for an appropriate charge, so long as the same privilege is permitted to all and engaged in without unjust discrimination. Carriers have much latitude to determine how they will handle traffic, provided equal privilege is extended to all and all are subjected to the same rule. If a carrier elects to haul private cars, we can require that they be hauled for all who offer them. We can within reasonable limits restrict their use so as to require, for instance, that coal cars serve a particular mine for a period of reasonable length in order to avoid market disturbance. We are without power, in my judgment, to say, as the majority report does in effect, that a private car can not be used at all except as a part of carrier equipment.

There is a public right and need to have railway fuel of high and even quality secured at the lowest cost. Assigned and private cars make for efficient and economical transportation. They promote regular mine operation, steady employment, reliable supply of coal of excellent quality to consumers, and low prices. If, under these circumstances, their use involves discrimination against some individual coal producers, such discrimination is in the public interest, is just, and should be supported. There is discrimination when cars are assigned to particular mines, but under existing conditions that discrimination is just and not unjust. There is discrimination always when, by common consent, anthracite coal is given a 100 per cent car supply. Where discrimination is just, it should be allowed. Only unjust discrimination is prohibited.

Carriers are not receiving the returns that the law contemplates, that fairness requires, and that the public interest demands as an encouragement to expansion and increase of carrier capacity. At the same time the country needs lower rates. Increased efficiency and reduced operating costs must be looked to for general rate reductions. Next to labor, coal costs are the highest item of operating expense.

No agency should leave undone anything within the legiti-
148 mate exercise of its powers to bring about a reduction of coal prices. From every quarter there is demand upon the carriers for increased efficiency and reduced operating costs. At such a time we, the guardians of public and carrier interests, are compelling the carriers against their will to adopt practices which will impair efficiency and increase costs. It must be recognized that the railways are making supreme effort, with much success, to meet the demands upon them. They are now more efficient than at any prior time in their history. With fewer men they have in recent months exceeded all prior achievements. They have been handling tonnage in record volume so efficiently that there has been scarcely a murmur of complaint and so smoothly that their marvelous performance is scarcely

noticed. Already superior in public service to every other system of transportation in the world, they are headed for better work in which there is promise that railway problems will disappear. We now come forward with condemnation of their economy, with directions that require disregard of the public interest and a policy of extravagance and waste.

The law authorizes regulation of transportation but not of the purchase of supplies, except in special instances not related to the car problem. Railways admittedly have the right to purchase fuel and other supplies where their judgment suggests. They require this right in order to obtain deliveries at points most convenient for use, economize haul and storage, avoid congestion, select fuel most desirable to meet varying conditions and power requirements, and promote efficiency and economy in general. Coals differ greatly in quality and condition, depending on the seams operated, methods of operation, and preparation, even as among mines on the same seam in the same locality. The percentage of carbon and volatile matter, firmness of texture or friability, and whether free or slow burning are important factors affecting efficiency and economy in coal use. The amount of dirt present because of bad roof or floor or partings or of careless mining methods is of importance; also whether the ash content is high or low, and the fusing point
149 of ash—whether so high that the ash readily escapes through the grate or so low as to fuse, clog the grate, shut off draft, and cause delays and engine failures. The importance of these various factors depends very largely upon the conditions under which coal is used. For these reasons the quality and condition of coal which different roads can use with efficiency and economy depends upon their peculiar operating conditions and the traffic which they handle. On carriers of light traffic density, high percentage of level track, easy curves, and steady regular evenly sustained train movement, the fuel problems are much less serious than on carriers with greater traffic density, heavy grades, varying profile, high degree of curvature, demand for steam fluctuating greatly during short periods because of operating conditions, necessity for high speed, traffic congestion, frequent meetings, and numerous delays. The conditions under which coal is used in the fire box of a locomotive are more difficult than those to which coal is subjected in any other use. Fire space is limited. Rapid conversion of heat units into available energy in small area is required, particularly under the severe conditions last mentioned. On a level railroad even steam pressure and even fires, making for efficient use of fuel, can be maintained. Under conditions of fluctuating power demand upon a locomotive, fuel consumption to maintain power sufficient for recurring periods of need means waste of fuel during intervals between. So on some carriers a free burning coal with which steam can be generated quickly is desirable. Careful preparation, dependable quality, and condition are of great importance. Because of necessity for forced draft, quick burning, and rapid conversion of heat units, the percentage of

loss in cinders through the stack and in unconsumed gases is greater in locomotives than under other boilers. As coal is used under a locomotive, less than 10 per cent of its heat units are converted into power available at the drawbar. The public interest requires that carriers select their coal with discrimination, and because of varying conditions general rules can not be applied to them. While under the law carriers have the right to buy all supplies, including
150 coal, where they please, the majority report destroys this right by saying in effect that they shall not use their own cars to haul their fuel unless they distribute their purchases among all mines.

How will the rule of the majority report affect a railroad which is dependent for its fuel upon mines located on foreign lines, and requires during the year at a particular junction, say, 500,000 tons of coal? The natural course for such a buying road, considering its own best interests and acting in a sensible and businesslike manner, would be to select its coal from particular mines, having regard to quality, reliability of deliveries, and price, and place its orders among a few mines. If the equipment to handle the coal is to be furnished by the originating carrier, that carrier will be under obligation to make pro rata distribution of its equipment. The purchasing carrier cannot know what would be the available equipment from time to time or how, in order to insure deliveries, its contracts should be distributed. Shortage in deliveries would subject it to the uncertainties of the spot market and it would have to increase its price when coal is in demand. The sensible course would be for such a buying carrier to furnish its own equipment in which to haul its coal. But, if this course were followed, all cars in excess of the general percentage distribution would have to stand idle. That would defeat the purpose for which the foreign line provided the equipment, and knowledge that such a practice would be followed would naturally deter foreign lines from purchasing equipment, although present conditions demand such purchases. Commissioner Hall points out what recently happened to such a carrier. It is likely to happen to any carrier at any time, and certainly will happen often.

Coal contracts generally contain provisions to the effect that the producers are not responsible for delays due to car shortage and strikes, thus exposing the buyer to these serious contingencies. A mine may have capacity for an output of 50,000 tons per month. One about to contract for coal, judging from past experience, would
151 conclude or guess upon a 50 per cent car supply or an actual output of 25,000 tons per month. Any reduction below this figure in the actual output because of car shortages which could not be foreseen (and they always occur) would result at best in a pro rata reduction of deliveries under all contracts. A consumer dependent upon a pro rata delivery of cars cannot possibly foresee what deliveries will be. If coal must be had regularly, the consumer must go into the spot market unless he has available for his use assigned or

private cars over which he has absolute control. Railroads and public utilities are such users. The fact that there is in the country an enormous surplus of developed and equipped mines beyond the need makes reliability of car supply impossible so long as cars must be prorated. In times of increased demand output is increased and calls for coal cars are increased. Unless cars are assigned, the available equipment must be distributed according to the traffic offered for shipment. No one can foresee what traffic at any particular time is to be offered, and no one can anticipate what the car supply will be. Ownership by foreign lines of cars sufficient to insure delivery of their coal supply and the right to restrict their use is essential to protect carriers against a fuel shortage, insure the observance of contracts, and the purchase of coal at advantageous prices. The mere purchase of cars by foreign lines without their assignment will not afford protection, for they would have to go with the general pool.

It is well known that mines assured of continuous operation favorable for low production costs will contract at lower prices. Opponents of the assigned and private car object to that desirable result. In order to maintain unhealthy and uneconomical conditions in the coal-mining industry they contend that they should have a part of the order of the buying road at high prices, although the interests of the general shipping public, which pays the carrier's coal bill, requires low fuel prices. The opponents of the private and assigned car demand that the interests of the many be sacrificed for the interest of the few, and we have sustained them. Such
152 is the gist of this entire controversy. Instead of prohibiting assigned and private cars their use should be encouraged. The greater the number of assigned and private cars properly used and the fewer the mines at which they are placed, the better for all concerned. If many shippers would provide their own cars, the carrier equipment available for others would be greatly increased, and the price of coal would drop. If this commission would announce the right of shippers to use private cars in their own service, reasonably regulated to restrict their use to particular mines for long periods, and that as thus used they would be protected, private capital would promptly come to the aid of the carriers and provide private cars to an extent which would insure ample equipment for all, reduce coal shortages to a minimum, and serve the public interest in a vital way.

The interstate commerce act gives us emergency powers. It licenses as a necessary evil the abomination of priority orders. Whenever there is a coal shortage we are required to resort to these powers in the interest of carriers, public utilities, hospitals, etc., which everybody recognizes must under all circumstances have fuel. Cars dealt with in emergency orders are withdrawn from general use at times when most needed. So used they cause confusion and disturb the market. With permission and protection for private cars, their use would be known and be counted upon and would affect no one injuriously. The shipping public stands ready to

augment the general car supply and eliminate the necessity for emergency priority orders largely if not entirely. The majority report requires continuance of the abomination. Whenever because of car shortage it is thought that the assigned car would hurt we will have to at that time come forward and do more harm with an emergency order.

Railways and public utilities which consume coal in large quantities in times of shortage are recognized as entitled to preferential treatment. Now, in times of emergency, they are placed ahead of the general public. If given permission to do so, they will so equip themselves that they can be considered last. It would seem obvious that in the public interest the policy of efficiency and economy
153 enjoined by law requires that consuming carriers provide equipment for their fuel, and that such equipment be devoted to their use at such mines as in the exercise of good business judgment should be selected as best suited. The majority report forbids this sensible businesslike practice. The statement in the majority report regarding the experience of the New Haven Railroad in the purchase of spot coal on the one hand and the use of the assigned car to take coal under contract on the other is strong condemnation of the conclusions at which the majority report arrives.

The majority report ignores the aspect of the assigned and private car as a storage facility. Admittedly a carrier is at liberty to provide itself with facilities for the storage of coal and such is the carrier's duty within reasonable limits. Vast expenditures would be required to establish facilities to store coal in considerable quantities at various points. There are no regular periods of surplus and too much storing would convert periods of surplus into periods of shortage. Costs of handling fuel in and out of storage are substantial. Much coal thus stored would require removal to other points for consumption. The most economical storage facilities, all things considered, up to a certain amount, are bins containing from 50 to 100 tons, with wheels under them, to facilitate prompt and economical handling and movement as required. While the carrier is at liberty to install inefficient and inconvenient stationary storage bins, the majority report denies the right to provide storage bins on wheels (cars) if such are to be sent to the mines for coal and used to transport coal from the mines, even though such use would add to the available equipment and to that extent release cars for other commercial use.

Just how industry will get along without the private car it is difficult to see. The common carrier and the public utility can be taken care of after a fashion through emergency orders, but at great inconvenience and expense to everyone else. Not so with a private industry. Take, for illustration, a large steel plant, upon the continuous operation and financial success of which many thou-
154 sands are dependent for employment and more thousands are dependent for low-priced commodities produced at low cost.

Such an industry may use a thousand tons of coal and coke per day and require deliveries every day. Economy and certainty of fuel constantly, suggests that it control its source of supply. It operates its own mines and coke ovens, which are 10, 50, or hundreds of miles away. Fluctuating demand on carrier equipment and uncertainty of carrier supply have compelled it to buy cars, which the railway hauls back and forth. It now enjoys continuous operation. The majority report says that no matter how many cars the industry has, it can not use any greater percentage for its requirements than the railway is able to furnish to all mines on its line for their requirements. Its extra cars must stand idle or it must divide all of its cars among all mines on the carrier's line and itself take only a pro rata share. The number of its own cars that it may use will not depend upon its own need but upon the need of others. When there is only a 50 per cent car supply for other mines, it must reduce its operation 50 per cent and shut down half of the time. Labor must be thrown out of employment, manufacturing costs must soar, and the whole country must suffer, because there are too many mines, and in order that mines that ought not to exist may continue to live at public expense. Seemingly, if the rule is to apply to coal, it must apply to other things and cars used for other supplies must be surrendered to the general pool.

We might well consider the effect of the rule of the majority report upon an industry like the Ford Motor Company, which employs, I believe, something like 70,000 men and which, because of its efficiency, is able to pay high wages and produce at low costs. It might well be that such an industry would find that steady employment of its men and their scale of wages and the low cost and selling price of its output would be imperiled by an uncertain car supply, increasing fuel costs, and unsatisfactory quality of available coal.

(General information now current suggests the use of the Ford
155 Motor Company as an illustration.) Good management in the interest of all concerned would suggest the acquisition of coal mines and the application of methods of high efficiency in their operation. The use of private cars assigned to particular mines would seem to be indispensable. The majority report bars them. It supports coal operators who would force the Ford Company to buy coal that would not suit its purpose and pay high prices because of high costs which Ford management would reduce. It says that inefficient mines which should not exist must be supported at the expense of the Ford Company, its employees, and the purchasers of its product. This illustration is typical of what the majority report will do throughout the entire industrial world.

Under the majority report railways having mines on their own lines cannot use their own cars to protect their coal supply, and if there is only a 50 per cent car supply for all, they must have only 50 per cent of their requirements. They, too, must shut down in times

of shortage or depend on storage, which in large quantities beyond a reasonable point can be accomplished only at great cost. Similarly, if we are consistent, cars used for other supplies, such as for ballast, must be prorated, even though maintenance work must stop. The only escape from these results is through confiscation or emergency orders, which at best would interfere with the car supply for mines generally more than would cars regularly assigned, and which the commission has heretofore consistently condemned.

There is another aspect of the assigned and private car more important, it seems to me, than all the rest. So far little consideration has been given to what is the basic vice in the whole coal situation. We have within our reach and subject to our will one of the roots of economic and industrial disturbance. With opportunity to uproot the evil, the report nurtures it and attempts only to find a way to get along in spite of it. We should destroy it, and the assigned and private car will help to do it.

The conditions which prevail in the bituminous-coal industry have been going steadily from bad to worse during the last decade.
156 They are a wasteful burden on economic life and breed discontent in our social order. Responsibilities are so scattered and faults are so widespread that individual endeavor can not supply a remedy. The allurements of profits have led to gross overexpansion. With national need for about 10,000,000 tons a week, the capacity of developed and equipped mines is more than 20,000,000 tons per week. The investment in development and equipment and all that goes with mining operations is more than twice the need if the industry were carried on so as best to serve the public interest. Excess capacity beyond what the market demands means idleness in the same ratio of mines, equipment, and men. An excess investment of more than 100 per cent would bring ruin to any other enterprise. All of the excess burdens are distributed over the actual output of running time and are borne by the consumer in the price he pays for coal. Profits have not been great, as a rule, in coal production, and with reasonable production costs would not make the selling price excessive. High coal prices are due mainly to excess production costs, which are caused by the excess capacity developed, maintained, and operated.

Not only are mines developed and equipped to produce 20,000,000 tons of coal a week but men sufficient to mine 20,000,000 tons of coal per week are being supported by the industry. Mines can not run full time because 11 or 12 million tons of coal a week for a considerable period would glut the market. They therefore run only two and three days per week. In order to support men working on half time costs per ton have so increased that mine wages are out of all proper relation to wages paid on the farms and by railroads and other industries. Common laborers make $7.50 per day, loaders make from $15 to $18 per day, runners of cutting machines make from $18 to $20 per day, runners of gathering locomotives make from

$18 to $20 per day. The result is that to produce coal is costing upward of $2 per ton, whereas 10 years ago it was only costing about 75 cents per ton.

Millions upon millions are being spent to provide additional
157 mining capacity in face of the fact that every mine opened and every ton of additional capacity developed makes matters worse. No check is being applied. The sedatives of price, fixing, zoning, and regulated distribution have been administered, but they do not reach the trouble. Reduction of high coal-production costs is a public necessity. A proper reduction of producing costs to a normal level should make a direct saving to the country in the price of coal of from $500,000,000 to $750,000,000 per year and much additional indirect saving. An amount equivalent to a contribution of perhaps upward of $10 per annum by every man, woman, and child in the country is being handed over to the coal producers in order to maintain mine employees as a favored class and mine operations as a favored industry.

Costs and selling prices can be brought down through control of transportation. If transportation were available to handle 11 or 12 million tons of coal steadily the surplus of available coal would break prices by forcing competition among producers, would close up high-cost mines, concentrate activity in 50 or 60 per cent of the mines, furnish steady employment at fair wages to the right number of men who should be engaged in coal mining and release the surplus for other industries where they are needed, reduce transportation cost, and break the vicious circle of high prices. A surplus of 10 per cent above the market demand for any article of commerce represents the difference between a price-raising shortage and a price-lowering surplus. A sustained surplus of coal will bring reduction. Everything is favorable for that surplus except transportation.

Increased available transportation can be obtained only through the acquisition of additional equipment or by increasing the efficiency with which existing equipment is handled. The question as to whether carriers should provide additional equipment is involved in another proceeding which is pending before us. At the present time they are making unparalleled expenditures to better equip themselves to render service. There is doubt whether it is to their interest
158 to increase their investment in coal cars and whether the public which in the end pays the carrying charges can afford to have them do so.

It would seem that railways should not be expected to do more than take care of the transportation demands of industry and commerce as normally carried on. As thus carried on, need for transportation can be foreseen and reasonably met. Railroads are not responsible for the uncertainties and fluctuations in the demands of the business world for transportation. They should not be expected to be ready to move all traffic promptly during abnormal periods of transportation demand following abnormal periods of inactivity, as

where a coal strike has prevented the shipment of coal which carriers were ready to haul. It would not be in the public interest that carriers at all times be equipped to handle abnormal peak loads. Sufficient facilities to handle promptly at all times the tonnage offered would mean an enormous investment that would be idle most of the time. The carrying, maintenance, and depreciation charges would be too high for a legitimate business enterprise to stand, and the rates that would be required would be prohibitive.

Transportation is a step in the process by which agriculture, manufacture, and commerce carry on the national industry. Its cost is a part of the nation's operating expense. Shippers pay for it and the greater the cost the greater the shipper's burden. Therefore, the interests of all demand an efficient transportation machine wisely constructed and economically operated. Obviously the most efficient operation is continuous regular operation evenly distributed throughout the year. The coal movement under normal conditions is spread fairly evenly over the 12 months, although a little more than half the annual movement is transported in little less than half the time. Ten million tons a week will take care of consumers' demands. With moderate provisions for storage consumers can, without any unreasonable burden, take deliveries evenly distributed over the year of approximately 10 million tons a week. The railways with their present equipment kept in good order can handle efficiently
159 and economically 10 million tons per week. Considering, therefore, only the volume of coal necessary to meet consumers' needs, the carriers are now fairly well equipped to handle that volume moving under normal conditions. It is difficult then to see why, in justice to the carrier and in justice to the shipping public as a whole, which carries the burden, there should be enlargement of carrier facilities to meet abnormal conditions for which the carriers are not responsible. Logically, those at fault for abnormal conditions should pay for the inconvenience which they cause. In other words, the coal industry and not the railways should be held responsible, and the troubles should be laid at the door of the coal producers, not the carriers. The real trouble with the coal situation is that there are too many mines in operation.

Increased efficiency in the use of existing equipment rather than more equipment is the urgent need. One way to bring it about is by revision of the rate structure and another way is by the increased use of assigned and private cars. Much that is wrong in the coal situation is due to following unsound methods in rate making, over which we have control and for which we are responsible. Abnormally low rates on long hauls are much to blame. Considerable can be done through cautious revision of the rate structure to remove unnatural adjustment with due regard for all entitled to consideration. Increased utilization of short-haul mines would increase efficiency and reduce costs in both mining and transportation. But that problem is not here. There is here the problem of car distribution—use of the assigned and private cars.

It must be borne in mind that we have just as much power to authorize and approve unequal distribution as we have to require equal distribution. The majority report recognizes that the law does not require equal distribution, but contemplates that conditions may require unequal distribution. The power is left with us to authorize what, all things considered, we deem just. Only unjust discrimination is to be condemned. Public interest now requires
discrimination in the use of cars and that they be assigned to
160 particular mines. Equal distribution among all mines which
the majority report requires is exactly what should not be had. What the country and the consumers of coal really require is an unequal distribution which will give the public the benefit of the economical low-cost mines and not compel them to support uneconomical high-cost mines. A sort of zoning is what is needed, perhaps more now than in war times. The proper use of the assigned and private car is a sound, sensible, businesslike method of zoning. Expectation of equal distribution, even more, perhaps, than an unsound rate structure, has brought about the undue expansion in coal production. If the use of cars had been properly restricted, half of the existing mines would not exist. The majority report will make bad conditions worse. Under it the expansion hostile to the public interest may go on, justified, encouraged, supported, and unchecked.

Some people seem to be overlooking the fact that industry generally does not function for the benefit of mines. Consumption does not take place for the purpose of keeping mines in operation. Fuel is produced for consumption, not consumed for production. It is the public consuming need and not the private producing need that justifies the industry and consumers' rather than the producers' rights are to be considered first. Consumers have the right to demand efficient and economical production and transportation.

No industry that tolerates unnecessary expense should expect to prosper, and the coal industry could not survive if it were not able to pass on to consumers the consequences of the industry's mismanagement. The industry should clean house. Many want to clean house. They can not do it alone. We have the power to assist the worthy and compel the unworthy through revision of the rate structure and the extended use of the assigned and private car. We should do what the consumers' interests require and almost, it might be said, forget the producer. We should construe the law as directing us to require the use of equipment as public interest demands to best serve the fuel need.

The immediate answer to the problem is the assigned
161 and private car. They will bring about continuous operation
of efficient mines at low cost. There are many concerns which, if permitted, will furnish private cars. It has been brought to our specific attention that this is true of distributors in New England. Permit them the use of the private car and the New England coal

problem will lose its serious aspect and the coal bill will be reduced. Many public utilities throughout the country using large quantities of coal would operate their own mines or contract for entire mine output, thus insuring dependable supply and continuous operation at low cost. Men would drift to mines thus continuously operated, which is what should take place. High-cost mines would have to shut down, and that is exactly what the existing situation calls for.

Every dollar that the private shipper puts into cars saves just that much railroad burden and to that extent serves the public interest by reducing the public's cost of carrying the railroads. Many consumers and shippers can afford to invest in private cars, because they will make savings that will compensate them. The ownership of cars does not place a burden on the consumer, but, in fact, lifts it. The saving in the cost of coal production will more than offset the investment in cars.

Nor does the use of private cars discriminate in any real sense against the coal producer. He is entitled to equal distribution of all of the railway equipment except as the carrier needs to use its equipment preferentially for fuel with which to serve all shippers. He is entitled to have the carrier equip itself with that reasonable amount of equipment which a carrier should own. He is not entitled to ask the carrier to provide an abnormal excessive amount to overcome the consequences of bad management of the coal industry. In addition to the equipment which a carrier should own, the equipment to handle abnormal peak loads should be provided by shippers, and they will gladly provide it if given permission. Let each producer have his full share of company equipment, but let private producers furnish additional cars for their exclusive use, provided they are used continuously at particular mines and not
shifted around from place to place for the purpose of
162 breaking prices. I am not certain but that the shifting would be a good thing if it would result in breaking prices. The point I make, however, is that the mine operator is not entitled to any more than his share of the carrier's equipment. He is not entitled to say that no shipper shall own private cars without sharing them with all others.

The claim that the railways are to blame for high wages and other mine costs, because they do not furnish cars for continuous operation, has no foundation. The mines alone are to blame, because of their excessive number. If they could increase production they could not market it. If there were a full car supply for everyone, no more coal would be sold and the mines would be just as bad off as they are to-day. The only effect of an increased car supply would be to reduce prices by increasing competition for the consumers' market. The problems are commercial. For them the mines are to blame, and not transportation, for which the railways are responsible. More cars in the aggregate is what the mines do not want.

What they want is to compel buyers to distribute their orders. There would be just as much logic in demanding that carriers so distribute the purchases of all materials and supplies, and, in fact, that all consumers distribute all their purchases among all producers.

Perhaps I have gone outside of the record in discussing this case. I do not agree with the statement in the majority report that we are confined to the record in the sense that we must make a report in accordance with it. This proceeding is an investigation upon our own motion. The burden is upon us to make a proper record. An insufficient record does not justify an unsound decision. It is a duty to go outside of the record, if need be, in order to protest against the record and an improper decision based upon it.

While the Congress, executive officials, and all sorts of committees and commissions are trying to find a way to correct the evils in the bituminous-coal world and break the vicious circle of high prices, it seems to be overlooked by everyone, including ourselves,
163 that we have real power with which we can do something.

We know what should be done and are in position to do it. In our treatment of the assigned and private car we are throwing away an important portion of our power. In what we would be required to do to get results, no invasion of any right would be involved and no serious question would arise. We would interfere with no one and discriminate against no one. All we need do is to permit all shippers who want them to possess and use private cars in carrying on their own business. With this right recognized and protected, the coal world itself would remedy the evils.

Cox, Commissioner, dissenting:

I am unable to concur in the finding of the majority that the present practice of assigning private cars and system or foreign-line cars for railroad fuel to coal mines is unreasonable or unduly prejudicial, and I find justification for the following dissenting opinion from a recital of facts from the majority report.

It is generally recognized that nothing is more important to our industrial development or national prosperity than the transportation systems of our country, and one of the important factors in the efficient and economical operation of the railroads is the question of a regular and certain supply of railroad fuel at reasonable prices. It has been stated that the assigned car enables the carrier to secure a regular and uniform supply of fuel, permits the placing of contracts for yearly consumption at reasonable prices, makes confiscation unnecessary, and does not force the carrier into the spot market for its fuel, which necessarily increases the price not only to the carrier but to the consuming public as well.

On page 535 of the majority report, the following appears:

"It is recognized that the importance of the railroads in the distribution of coal and other commodities, and their general depend-

ence upon bituminous coal in producing transportation, requires that in some lawful way they may be assured of a steady sup-
164 ply of suitable coal. It is likewise generally admitted that, whatever means are adopted to secure such supply, emergencies will occur when the supply will fail unless the railroad is enabled by some means within the law to take sufficient coal ahead of less necessitous uses to keep the flow of traffic going as the public interest requires. There is no dissent from the proposition that confiscation of fuel coal by railroads is a practice to be avoided. It seems to be generally accepted that the public interest requires that that carriers shall not be subjected to unreasonable prices.

* * * * * * *

"There is enough bituminous coal in the ground in this country to more than supply the demands of all consumers for a long period. There are more than enough miners to produce coal for all purposes. There are more mines than is consistent with the most efficient use of equipment, and their aggregate capacity exceeds greatly the country's demand. * * * The aggregate time lost because of car shortages, local and general, is a considerable proportion of the whole of any recent elapsed period of time. And during each period of car shortage the practical problem of supplying the railroads with fuel has been presented sharply, and the meeting of the problem has been most troublesome, and has necessarily involved considerable disturbance of production and transportation."

And again, on page 537:

"The president of the railroad company testified that the assigned cars were essential for the following reasons: (1) They gave the carriers a regular and certain supply of coal in times of car shortage. (2) The coals from different fields are not of the same grade, which requires that certain adjustments be made in the locomotives. The Alabama coal is a different grade from that mined in southern Illinois, and again, the coal in different counties in Illinois has dif-
165 ferent burning qualities. (3) Unless the carriers can contract for a regular and suitable supply of coal, resort to confiscation becomes necessary. (4) Going into the spot market would increase the price of coal, not only to the carrier but to the consuming public as well."

Page 538:

"The assigned car, the New Haven claims, enables it to secure a uniform quality and grade suitable for its requirements and favorable to good service; permits the placing of contracts for yearly consumption at reasonable prices; requires the use of a minimum number of cars on consuming line in its fuel service; results in an increase in the number of cars available for commercial loading; reduces unloading costs, as the unloading facilities and types of cars are each adapted to the other; affords a greater opportunity for solid train

movement of empties and loads; and affords a better standard of maintenance and equipment on account of system cars being more regularly at home."

Page 539:

"A plan has been worked out through the use of the assigned car whereby coal produced in a certain territory will go to the same divisions continuously, and this, it is urged, results in increased efficiency. Any change in the assignment of coal lowers the efficiency of the motive power. With the assigned car the Baltimore & Ohio used an average of about two grades of coal on a division. During the strike period in 1922 it was necessary to use about 18 to 20 different grades, and the performance of the motive power was unsatisfactory."

Page 546:

"If a foreign carrier were not permitted to assign its own cars to a coal-loading carrier, the latter would be under the primary duty of supplying cars at the mines. There would follow a reduction
165 in the supply available for the commercial mines, because of the necessity for spreading the cars that were at hand over a wider field. * * * For that reason the carriers claim that such cars are a distinct advantage to the commercial operator."

Page 551:

"Mine operators prefer to have the assurance that cars will be furnished for railroad fuel coal, and a promise of this character is one of the factors which influences the making of the contract. If the operators do not have this assurance, there would be a higher price."

Page 558:

"Under the impetus of the war demand for coal and prolonged coal-car shortages, the ownership of private coal cars increased. There can be no doubt the incentive was the more regular and larger car supply provided under the operation of the assigned-car practice."

Page 559:

"It is abundantly made clear from the record that as competition becomes more keen more and more the public utilities, steel producers, manufacturers of by-product gas, automobile manufacturers, certain chemical manufacturers, glass works, and other industries likewise absolutely dependent upon a steady supply of coal, rather than face ruin each recurring coal-car shortage, will be compelled to acquire private cars which they may have assigned."

I can not consistently condemn a rule or policy which in its application lends itself to the more efficient and economical operation of both mines and railroads and which in time of emergency must of necessity be applied in order to meet the urgent and imperative needs of the carriers and public utilities particularly, and of the public generally.

167 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of June, A. D. 1923

No. 12530

In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

The Algoma Central & Hudson Bay Railway Company et al.

168-232 [Omitted in printing.]

233 It appearing that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary;

It further appearing that said order dated March 22, 1921, was served in the manner provided by law upon all carriers by railroad in the United States subject to the interstate commerce act, said carriers being listed above and hereinafter referred as as respondents;

234 It further appearing that a full investigation of the matters and things involved has been had with respect to carriers serving bituminous-coal mines, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

And it further appearing that no reason appears for the continuance of the investigation as to carriers serving solely anthracite-coal mines:

It is ordered that each of the respondents be, and each is hereby, notified and required to cease and desist, on or before September 1, 1923, and thereafter to abstain, from maintaining and enforcing, in so far as such respondent maintains and enforces, a regulation and practice whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars, or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars.

It is further ordered that each of the respondents which distributes cars to bituminous-coal mines located upon its line or customarily dependent upon it for car supply be, and each is hereby, notified and

required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribu-
235 tion of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

It is further ordered, that the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, be, and it is hereby, discontinued.

And it is further ordered, that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

236 *Exhibit F to bill of complaint*

Order. At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of October, A. D. 1923. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel

Upon further consideration of the record in the above-entitled proceeding, and of petitions for rehearing filed herein:

It is ordered, that the order entered in this proceeding on June 13, 1923, which was by its terms made effective September 1, 1923, and which was on July 25, 1923, modified so as to become effective on October 1, 1923, and on September 12, 1923, was further modified so as to become effective November 1, 1923, be, and it is hereby, still further modified so that it will become effective on December 1, 1923, instead of on said November 1, 1923; but in all other respects the said order of June 13, 1923, shall remain in full force and effect.

And it is further ordered, that this proceeding be, and it is hereby, reopened for further hearing upon the petitions for rehearing filed herein.

And it is further ordered, that this proceeding be assigned for hearing before Commissioner Aitchison at the offices of the commission in Washington, D. C., at 10 o'clock a. m., on the 22nd day of October, 1923.

By the commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

237 *Exhibit G to bill of complaint*

Interstate Commerce Commission. Assigned cars for bituminous coal mines. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel. Submitted December 19, 1923. Decided December 23, 1924

1. Paragraph (12) of section 1 of the interstate commerce act held to apply to cars placed at carrier-owned and output-contract mines, and can not be relied upon to show that the Congress exempted such cars from the other provisions of section 1 requiring reasonable rules of distribution, and the provisions of section 3 prohibiting unduly preferential or prejudicial rules.

2. Findings in former report, 80 I. C. C. 520, that the practice of respondents in assigning private cars, and system or foreign-line cars for railway fuel, to bituminous-coal mines in excess of the ratable share contemporaneously distributed to bituminous-coal mines upon their lines which do not receive assigned cars, found for the future to be unjust and unreasonable, and unjustly discriminatory against, and unduly prejudicial to mines not receiving assigned cars, and unduly and unreasonably preferential of mines which are furnished such cars in excess of the ratable proportion, and that cars specially placed by order of the commission under the provisions of paragraph (15) of section 1 of the act may properly be treated as assigned cars, and need not be taken into account in determining the ratable distribution when the order of placement so requires, affirmed.

3. Order entered in this proceeding June 13, 1923, the effective date of which has been postponed until January 15, 1925, permitted to become effective on March 1, 1925.

238 Henry Wolfe Bikle, W. S. Bronson, Kenneth F. Burgess, H. T. Dick, O. W. Dynes, R. V. Fletcher, F. W. Gwathmey, Walter McFarland, W. A. Northcutt, C. C. Paulding, H. R. Preston, Theodore W. Reath, C. J. Rixey, C. M. Sheafe, jr., and H. A. Taylor for respondents, members of the American Railway Association; J. H. Fishback for Canadian National Railways; Joseph H. Noelle for New York, Ontario & Western Railway Company; and Eugene S. Williams for Western Maryland Railway Company, respondents.

August G. Gutheim and James W. Carmalt for Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahontas Consolidated Coal Company, Pennsylvania Coal & Coke Corporation, Pittsburgh Plate Glass Company, Public Service Electric Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company, Donner Union Coke Corporation, Rainey-Wood Coke Company, and Island Creek Coal Company; Hugh F. Smith, F. C. Slee, and Ralph J. Baker for Seaboard By-Product Coke Company, Chicago By-Product Coke Company, Donner-Union Coke Company, and Rainey-Wood Coke Company;

Wayne Johnson for Pennsylvania Coal & Coke Corporation; Richard Jones, jr., for Republic Iron & Steel Company; L. A. Manchester for Youngstown Sheet & Tube Company; Paul D. Cravath, Hoyt A. Moore, and Frederick L. Ballard for Bethlehem Steel Corporation and subsidiaries; Richard V. Lindabury, Charles McVeagh, and Charles S. Belsterling for Illinois Steel Company, Carnegie Steel Company, American Steel & Wire Company, National Tube Company, American Sheet & Tin Plate Company, United States Coal & Coke Company, United States Fuel Company, and H. C. Frick Coke Company; Clifford H. Browder for International Harvester Company and Wisconsin Steel Company; Horace Andrews, W. P. Belden, and John B. Putnam for Cleveland Cliffs Iron Company, Steel Company of Canada, Limited, Perry Iron Company, and Pickands, Mather & Company; C. B. Longley for Ford Motor Company; and E. T. Butler for Trumbull Steel Company and Trumbull Coal Company.

239 Russell B. Burnside and Charles G. Blakeslee for Public Service Commission of New York.

Shearman & Sterling, Samuel E. Wolf, William C. Speer, James L. Quackenbush, M. S. Sloan, J. C. Edwards, and W. L. Pepperman for various public utilities.

Butler, Lamb, Foster & Pope and Ernest S. Ballard for National Coal Association; A. M. Liveright for Central Pennsylvania Coal Producers' Association; R. W. Ropiequet for Illinois Coal Traffic Bureau; L. C. Boyle and George N. Brown for Southern Ohio Coal Exchange; C. D. Boyd for Harlan County Coal Operators Association and Hazard Coal Operators Exchange; E. L. Greever and Greever & Gillespie for Pocahontas Operators Association and Operators Association of Williamson Field, W. Va.; S. C. Higgins for New River Coal Operators' Association; A. R. Yarborough for Kanawha Coal Operators' Association; C. J. Neekamp for Northeast Kentucky Coal Association; E. J. McVann for Northern West Virginia Coal Operators' Association; W. L. Hammond for White Star Coal Company and Detroit City Gas Company; and Van A. Bittner and W. Jett Lauck for International Union, United Mine Workers of America.

REPORT OF THE COMMISSION ON FURTHER HEARING

ANDERSON, Commissioner:

This case is before us on further hearing. On March 22, 1921, we instituted an investigation upon our own motion, with respect to the reasonableness and propriety of the present car distribution rules of the respondents, i. e., all the steam-railroad carriers subject to our jurisdiction, in so far as such rules apply to privately owned coal cars and cars furnished for railroad-fuel coal, with a view to prescribing such just or reasonable rules or regulations as might appear to be necessary.

On June 13, 1923, after extended hearings and argument, we issued our report, 80 I. C. C. 520, in this proceeding. The rule as
240 proposed by respondents at the hearings provided in substance that assigned cars, namely, cars for railway fuel and private cars, must be placed at the coal mines to which assigned; that if the assigned cars thus placed at a mine should equal or exceed the mine's pro rata share of the available car supply for that day it should not be entitled to any unassigned cars; but that if the number of assigned cars placed at the mine should be less than its pro rata share for that day it should be given enough unassigned cars in addition to its assigned cars to make up its pro rata share. This rule and the classes of cars it covers are more particularly described in our report, pages 522 et seq. We there held that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act, and found—

that in the distribution of cars for transportation of coal among the bituminous coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of
241 such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall preclude the commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

There appears to be no reason for the continuance of the investigation as to carriers serving solely anthracite coal mines, and the present investigation, as far as it in terms covers the distribution of cars at anthracite mines, will be discontinued.

By an order issued at the time of our report, June 13, 1923, we required the respondents, on or before September 1, 1923, to discontinue the regulation and practice found to be unreasonable and unjustly discriminatory in the report and thereafter to establish rules and practices in conformity with our finding. We thus required the carriers to abolish the assigned car rule.

Soon after our report was issued, and before the effective date of our order, petitions for rehearing were filed by the respondents and by a number of owners and users of private cars. The case was reopened upon the petitions filed herein, a hearing was held, briefs were filed, and the case was orally argued. It is now before us upon the voluminous record made in the original hearing and
342 on the further hearing. Pending the disposition of this case we have from time to time postponed the effective date of our original order. On the further hearing, as in the original hearing, the evidence related to distribution of cars to bituminous mines as distinguished from anthracite mines and our present determination will be so limited.

We shall first deal with assigned cars for railway fuel, and then with assigned private cars.

ASSIGNED CARS FOR RAILWAY FUEL

In the original proceeding respondents contended that on any particular day a carrier should be permitted to assign cars to a mine for railway fuel in excess of the mine's pro rata share of cars even though on the following day the mine should ship commercial coal. The carriers now take the position, however, that without exceeding the day-to-day assignment of cars to be unlawful, they can get along if permitted to assign cars to mines the entire output of which they take for a substantial period. They now contend only for a rule which will permit the unrestricted placement of cars under the assigned-car rule to such mines. Respondents in argument assume the period to be at least six months or a year.

The principal contentions of the carriers are (1) that we are without authority under the interstate commerce act to abolish the assigned-car rule as applied to cars placed at mines owned by a railroad and furnishing it their entire output for an extended period, six months or more, and to mines from which a carrier purchases the entire output for a like period, and (2) that if we have such authority, the record shows that the rule is reasonable and not unjustly discriminatory.

Situations of individual carriers summarized.—In their petitions for rehearing respondents asked that the case be reopened and evi

dence heard for the purpose of ascertaining whether the experience of the carriers shown in the table on page 556 of our original report as not using assigned cars, is such as to justify the abolition
243 or the assigned-car rule. On further hearing witnesses representing eight of the 52 carriers listed in this table testified as to the individual situations on their respective lines. We summarize the showing as to the eight as follows:

The Great Northern has not found it necessary to follow the assigned-car practice in securing its coal. Our table is correct in showing that it was not assigning cars in 1920 and on October 1, 1922. For periods of a few days at times the carrier insists that its fuel coal be loaded by the mines in preference to commercial coal. About 53 per cent of the fuel which the Great Northern uses is obtained from the docks at the head of the lakes and is consumed on its lines east of Wolfe Point, Mont. Box cars are used to a considerable extent for this movement. The remainder of its fuel is obtained from Montana mines, the largest one of which it owns, and from a mine at Fernie, British Columbia. About 94 per cent of the coal produced west of Wolfe Point is used for company fuel. Part of this comes from small mines with which the carrier has made partial-output contracts to enable them to continue in operation. During the coal strikes of 1919 and 1922 some coal was received by the Great Northern from mines in Illinois. From September, 1922, to April, 1923, between 11,000 and 12,000 cars of coal were received from this source. About 11 per cent of this coal came in cars which this carrier delivered to the Chicago, Burlington & Quincy to be placed at a mine at Herrin, Ill., with which the Great Northern had a contract for the entire output. The witness produced by this company was not informed as to whether the cars which were thus delivered were placed in excess of the mine's distributive share.

The Chicago & North Western originates on its line from 200 to 400 cars of fuel per day for its own use, and from 20 to 200 cars of commercial coal. On an average 30 per cent is commercial and 70 per cent fuel coal. The greater portion of the company's fuel comes from its own mine in McCoupin County in central Illinois.
A part of its supply comes from mines which it owns near
244 Buxton, Iowa, and from other mines located in that State and in Wyoming. This company does not follow the assigned-car practice in obtaining its coal. This was true in 1920 and in October, 1922, as shown in the table in our report.

The St. Louis-San Francisco has not followed the assigned-car practice in obtaining fuel coal from mines on its own line. In case of car shortage the mines give the railroad preference in filling orders for coal. About 20 per cent of its fuel supply is obtained under partial-output contracts from mines off its line, located on short lines in Illinois near St. Louis, except a mine located on the Louisville & Nashville, the output of which is taken jointly by the

St. Louis-San Francisco and the Missouri-Kansas-Texas. These two lines furnish a full car supply, if needed at the mine on the Louisville & Nashville, without reference to the existing car supply on that road. Cars are also furnished for loading at the other off-line mines, but the witness called by this carrier was not informed as to whether such cars were placed in excess of the mines' distributive share. The Seaboard Air Line furnishes cars for its coal at mines on the St. Louis-San Francisco. If these mines are given more than their percentage allotment, the excess is equalized as promptly as possible. Of the St. Louis-San Francisco's fuel requirements, 25 per cent is cared for by oil. Except in times of anticipated mine suspension this company does not store coal.

The Atchison, Topeka & Santa Fe followed the assigned-car practice in 1920 and was following it on October 1, 1922, in the placement of stock and ballast cars at mines on its line. The company owns 6,000 hopper-bottom stock cars and 2,500 drop-bottom ballast cars. These, the witness for the company testified, are not acceptable to commercial coal loaders, but it is shown that they are loaded at mines which also ship commercial coal and can be dumped in the same manner as ordinary coal cars. They are used exclusively in times of car shortage for company fuel and are counted against the mines under the assigned-car rule. At other times ordi-
245 nary gondolas are use for this purpose. This company consumes about 140 cars of coal a day, 80 per cent of which is secured from mines on its own line, including its own mines. In times of car shortage about two-thirds of the fuel coal from mines on its line moves in the stock and ballast cars, the remainder in other cars distributed on a pro rata basis. Coal from off-line points is secured from a mine on the Burlington and from one on the Minneapolis & St. Louis. The latter furnishes about four cars a day in Atchison, Topeka & Santa Fe cars. The witness was not informed as to whether these cars are placed at the mine in excess of the commercial ratable distribution. About 60 per cent of the company's total fuel requirements is met by the use of oil.

The Carolina, Clinchfield & Ohio is shown in our original report as assigning cars for its fuel purposes in 1920, and as not following this practice on October 1, 1922. However, the record on further hearing shows that in 1920 this company did not find it necessary to resort to the assigned-car practice. During the almost continuous car shortage that year, when the supply ran as low as 50 per cent for extended periods, the company was able to secure preferential loading of its coal at the mines with which it contracted. In other words, the mine operator deferred the filling of commercial orders until the railroad's fuel needs were met. Beginning in November, 1922, the carrier began to assign cars, as it was unable to get its contracts filled during the car shortage then existing, and because the coal company with which it contracted for fuel refused to fill its orders

in preference to commercial customers. It assigned the cars to a mine the output of which was taken jointly by it and the Southern. It consumes coal at the rate of about 20 cars per day. It has on its lines 25 mines, producing 350 cars of coal per day, which represents 65 per cent of the total tonnage handled. It owns sufficient cars to care ordinarily for the output of the mines on its line. These cars normally move to southeastern territory and come back regularly.

During 1922, however, owing to the coal miners' strike, many
246 of its cars were diverted from their usual channels and moved to western territory. This resulted in a considerable shortage. No coal is stored by this company.

The Western Maryland obtains its coal under yearly contracts from four or five mines having a total capacity of about 50 cars per day. These mines are located on its line or on lines over which it has trackage rights. They produce no commercial coal. This carrier follows the assigned-car practice when it considers this necessary. In October, 1922, it was not securing its fuel coal in assigned cars but did so in 1920. A car shortage developed the first week in November, 1922, and lasted until April, 1923. During this period assigned cars were used to cover the fuel needs of this carrier.

Subsequent to our former hearings in November, 1922, the Seaboard Air Line arranged with the St. Louis-San Francisco, Louisville & Nashville, and Birmingham Belt to assign cars for its fuel supply to mines on those roads in the Alabama field. Cars were furnished by the Seaboard under this arrangement. The witness produced by this carrier had no information as to whether the roads to which such cars were delivered placed the cars in excess of the pro rata share of such mines, but stated that since the cars have been furnished by his road to mines on lines of these carriers, an adequate and dependable supply of the proper grade of coal has been secured.

The table in our report is correct in showing that the Delaware, Lackawanna & Western did follow the assigned-car practice in 1920 and was not following this practice on October 1, 1922. On the latter date it had a surplus of about 1,700 cars of bituminous coal on line, which, following the coal miners' strike, had been secured principally from England and in part from Nova Scotia and Virginia. This surplus was greatly reduced toward the latter part of 1922, and the carrier then resumed the assigned-car practice. It regarded this as the only practicable means of securing its coal during the car shortage then existing. This carrier's fuel supply of about 100 cars a day is secured from mines on foreign lines in Ohio and Penn-
247 sylvania. About 60 per cent of its supply is secured from output-contract mines on the assigned-car basis and 40 per cent from partial-output mines without assigned cars.

In our report, page 541, we pointed out that certain important carriers, including the Pennsylvania, New York Central, and Louisville & Nashville, had not presented any statement of the reasons which impelled them to adopt or maintain the assigned-car practice.

In their petition for rehearing respondents referred to this statement, and asserted that if we considered the record deficient in this respect, their petition should be granted in order that information might be supplied as to the practice and experience of these railroads. On the further hearing the New York Central and its affiliated company, the Michigan Central, introduced evidence as to the individual situations on their lines. The Pennsylvania and the Louisville & Nashville offered no testimony, but announced that they would rely upon the evidence introduced by respondents in the original hearing. Certain other carriers not shown in the table in our report introduced evidence on further hearing. The individual situations shown will be briefly reviewed.

The New York Central Railroad consumes normally 8,000,000 tons of coal per year, 74 per cent of which is obtained under contracts which call for the total output of the mines for a year, and cover the carrier's minimum requirement of 450 cars per day. These mines are on the assigned-car basis. Among these mines are nine owned by the carrier through a subsidiary company, the Clearfield Coal Corporation. The company mines supply the carrier with about 120 cars of coal a day at a price 7 cents per ton less than that paid to other operators in the same district. Different kinds of coal are used on various divisions of the carrier, and the engines are drafted accordingly. The carrier claims that in time of sustained car shortage it is necessary to use assigned cars to insure delivery of the proper quality of coal. During the winter the carrier's daily consumption of coal reaches a maximum of 600 cars, and the additional coal is purchased from partial-output mines and obtained without assigned cars. In October, 1923, this carrier had in storage 750,000 tons of coal or about 43.5 days' supply. It customarily carries from six to eight days' supply in cars, some of which is hauled 500 to 600 miles. The witness for this carrier stated that if not permitted to assign cars in case of a sustained car shortage, it would be necessary to increase the supply in cars to from 10 to 12 days, thereby tying up approximately 2,500 additional cars for fuel.

The Michigan Central secures about 24 cars per day of its fuel requirements of 140 cars from mines on its line in Michigan. It has two contracts for the total output of mines on foreign lines. Other contracts are made jointly with other subsidiary lines of the New York Central. Its fuel supply in Michigan, as well as at other mines from which it takes a partial output, are secured without the use of assigned cars. Before placing contracts, invitations to bid are sent to between 200 and 300 operators. Contracts are made for the coal year. Under the assigned-car rule, this carrier is able to secure coal from approved mines which guarantee a regular source of supply. From 1912 to 1917 it secured its entire supply without the use of assigned cars. The carrier contends that without assigned cars it would be unsafe to carry less than 10 days' supply under load, while with the assigned car about six days' supply is kept under load.

The Erie Railroad consumes approximately 3,800,000 tons of bituminous coal a year. Approximately 54 per cent is from mines on foreign railroads, and the remainder comes from mines on its own line. Among the latter are 10 mines operated by two companies, the stock of which is owned by the carrier. These 10 mines furnish approximately 40 per cent of the carriers' total fuel supply, and also ship small quantities commercially. Only a small percentage of the coal produced on the line is commercial coal. This carrier purchases its coal under contracts providing for delivery of a maximum and minimum tonnage, the minimum being 20 per cent less than
249 the maximum. The carrier obligates itself to take the minimum, but may take the maximum. In securing its coal the carrier follows the assigned-car practice. A large amount of its coal originates on the Pittsburg & Shawmut and is obtained through brokers. The Erie delivers its cars to that carrier for use by the brokers who designate the mines at which the cars are to be placed on the assigned-car basis. At the time of the hearing in October, 1923, this carrier had stored about 60 days' supply of coal on the ground.

The Hocking Valley consumes normally about 25 cars of coal a day, which it secures from three of the 150 to 200 bituminous mines which it serves. One of the three mines furnishes its entire output to the carrier, the other two only part of their output. In making contracts for the output of mines the period provided is not less than six months. The assigned-car practice is followed as to output mines, but not as to partial-output mines. The carrier owns 350 side-dump cars, which are classed by it as work cars, and used exclusively in securing its fuel coal. These cars, with others of the same kind, were formerly used in commercial service. The others, however, were converted in 1918 into solid-bottom cars to make them more suitable for commercial use. The carrier's coaling stations have been constructed for the use of side-dump cars, and are not suitable for the use of cars of other types. The 350 side-dump work cars are used at both the total-output mines and the partial-output mines. However, they are not placed in excess of the distributive share of the partial-output mines. From 60 to 70 cars of locomotive fuel are ordinarily carried at the fuel stations each day. About 50,000 tons of coal were stored on the ground between February and July of 1923. Some of this coal had to be removed because of spontaneous combustion.

The Chicago, Rock Island & Pacific system consumes about 3,500,000 tons of coal per year. About 40 per cent of this coal is secured from 15 of the 72 mines on its line. The remaining 60 per cent is secured from mines in Illinois on the Chicago & Alton,
250 the Chicago, Illinois & Midland, and the Louisville & Nashville; from mines in Colorado on the Colorado & Southern and Denver & Rio Grande, and from mines in New Mexico on the El Paso & Southwestern. This coal is used as nearly as possible

to point of production. The carrier sends cars under special assignment to the mines on foreign lines, except to those in Colorado and New Mexico, where 50 per cent of the car requirements are furnished. This, however, is under an agreement between the railroads, and includes cars for commercial loading as well as cars for railroad fuel. The carrier follows the assigned-car practice as to mines on its own line, including four or five mines it owns in Oklahoma, which supply about 50 per cent of its fuel coal. They also engage in commercial business. This is true of other mines on its line furnishing it with coal. The witness produced by this company was not informed as to whether cars were placed for its fuel loading at mines on foreign lines in excess of their pro rata share of cars.

In our former report, at page 541, we described briefly the practices of the Chicago, Burlington & Quincy with respect to its fuel supply. The capacity of the mine which it owns in southern Illinois has since been increased from between 4,200 and 4,500 tons to between 5,500 and 6,000 tons per day, and is expected ultimately to reach a capacity of 7,000 tons per day. From January to July, 1923, the lowest price which the carrier paid for coal from mines other than its own mine was $2.96 per ton in May, and the highest was $3.19 per ton in January. The prices thus paid were approximately 40 cents per ton higher than the cost of coal from its own mine. This mine is owned through a subsidiary company. The authorities of Illinois authorized such ownership as in the public interest provided that the price paid by the carrier for the coal purchased from the coal company should not exceed the cost of production plus interest charges and depreciation and provided that no coal should be supplied to the general commercial trade. The company assigns cars only to its own mine and to a mine whose
231 output is taken by another carrier in cars furnished by the latter. About 7,000 of the 13,500 tons which the Chicago, Burlington & Quincy consumes daily is procured without assigned cars from mines the partial output of which it takes. During slack periods, or when requirements are less, its own mine is closed down because the contract mines meet its requirements. This carrier stores coal, but has found it impracticable to store fine coal. On October 1, 1923, 648,685 tons of coal were in storage at 20 different points. On lines east of the Missouri River, the carrier operates 121 self-firing locomotives which burn fine coal. This kind of coal is most satisfactory from the standpoint of price and helps commercial mines to dispose of a grade for which there is frequently no market. In a number of instances the carrier obtained coal from mines other than its own to improve conditions and realize more freight revenue.

In our original report, page 537, we stated that the Chicago Great Western owned a mine on the Illinois Central and had provided itself with hopper-bottom cars, which were assigned to the mine to take care of its fuel needs. The controlling interest in this mine

was acquired in 1917. The Madison Coal Corporation, a subsidiary of the Illinois Central, operates the mine and furnishes the entire output to the Chicago Great Western for fuel. About 80 per cent of the carrier's daily consumption of 2,300 tons is obtained in the hopper-bottom cars from this mine on the assigned-car basis. The carrier has 21 modern mechanical coaling stations on its line, for which these cars are especially adapted and at which they can be unloaded at a cost about 14 cents per ton less than the cost of unloading from miscellaneous equipment.

The practices of the Chesapeake & Ohio were explained in our report at page 540. Since the original hearing it has reduced the number of cars daily under load with fuel from 1,200 to 700, or approximately 1,300 loaded and empty cars out of an ownership of 40,000 coal cars. This was accomplished by discontinuing the practice of concentrating fuel coal at division points, from which
252 it was rehandled. It now moves direct to the consuming point. The locomotives of the carrier are designed to use nut and slack coal largely. This represents approximately one-third of a mine's output, lump and egg representing the remainder. The witness produced by this carrier expressed the opinion that preferential contracts calling for nut and slack are not practicable, since lump and egg coal must be produced and shipped at the same time; and that it would not be practicable to supply the kind of coal in the type of car suited for unloading at the various coaling stations if pro rata distribution should be required. During the first six months of 1923, when a car shortage existed, 25,148 cars were supplied for company fuel. The witness testified that if these cars had been distributed with other cars on a pro rata basis the car supply at commercial mines would have been increased 22 per cent. From July to September the increase, it was testified, would have been 1 per cent. This carrier will not receive assigned cars from a foreign line unless they are delivered in cuts of 15 cars or more and are for placement at a mine or mines having output contracts with the foreign line for a period of not less than six months. On October 1, 1922, the Atlantic Coast Line, the Richmond, Fredericksburg & Potomac, and the Detroit & Mackinac had contracts for fuel supply with mines on this carrier's rails, but cars were not assigned to any of these mines until the latter part of the year because of the condition of the motive power of the Chesapeake & Ohio. Since that time cars have been assigned for the Atlantic Coast Line and the Detroit & Mackinac, but not for the Richmond, Fredericksburg & Potomac because that carrier has been unable to meet the requirements of the Chesapeake & Ohio.

The Canadian National, which includes the Grand Trunk, referred to at page 540 of our report, obtains from 35 to 40 per cent of the 8,500,000 tons of coal it consumes per year from mines in the United States. About 20 per cent of the entire supply is from two mines which it owns in Ohio, one on the Pennsylvania and the other

253 on the Baltimore & Ohio. Both are on the assigned-car basis. The cars are furnished by the Canadian National. These mines were selected because of the quality of coal produced. The carrier obtains approximately 1,000,000 tons of fuel coal per annum in this country, without assigned cars, from various mines from which it purchases part of the output. The assigned-car practice is not followed in securing coal in Canada. The carrier attempts to keep from 60 to 100 days' supply of coal on hand with a larger supply at the lake ports in order to provide for the entire winter. At the time of the last hearing it had from 90 to 100 days' supply at all points.

The Associated Industries of Massachusetts, with a membership of about 1,557 manufacturing industries, appeared in support of the assigned-car rule, and urged that it be left in effect to enable the New England carriers to secure a regular and dependable supply of coal.

On the further hearing, the assigned-car rule was opposed by the International Union, United Mine Workers of America, and by various coal operators' associations, including the National Coal Association, the Central Pennsylvania Coal Producers' Association, Southern Ohio Coal Exchange, Pocahontas Operators' Association, and the Illinois Coal Traffic Bureau. Generally speaking, the opponents of the rule contend that the evidence introduced on further hearing is merely cumulative and that no showing has been made which would warrant us in reversing our decisions in the original case.

Evidence was introduced by some of the opponents of the assigned-car rule to show the discriminatory effect of this rule, the resulting diminution in the percentage allotment at nonassigned-car mines, and the practicability of securing railway fuel of proper quality at reasonable prices without assigning cars under the rule. The National Coal Association introduced in evidence, among other things, a table showing new equipment acquired, condition of old equipment, and railroad fuel coal stored by railroads of this
254 country, following an efficiency program which was adopted by railroad executives on April 5, 1923, to enable the carriers better to meet the transportation demands of the country. This table showed railway coal stored on November 1, 1921, to be 11,701,236 tons, on October 1, 1922, 5,423,195 tons, and on October 1, 1923, 17,663,448 tons. This association also introduced evidence showing tonnage of coal moved by representative noncoal-loading carriers, coal cars owned by each, and percentage of cars owned on line, by months, for the years 1920, 1921, and 1922, the percentage being substantially more than 100 per cent during the car-shortage periods of 1920 and the last half of 1922. The witness for the International Union, United Mine Workers, testified as to the irregularity in working time of miners in various sections of the country during the year 1921, and asserted that, although that was a year of full car

supply, the irregularity in working time resulted largely from overdevelopment of the mining industry caused by the assigned car in the past. In addition to testifying as to the adverse effect of the assigned-car rule upon labor, this witness also testified that the use of the assigned car enables the railroad to obtain cheaper fuel at the expense of the public, because with short-car supply at other mines the cost of production is increased, and this increased cost is passed on to the public.

Contention as to our authority.—Our authority over the distribution of cars of carriers subject to the act is to be found in sections 1, 3, and 15. Section 1 requires rules of car distribution to be reasonable, section 3 prohibits them from being unduly preferential or prejudicial, and sections 1 and 15 authorize us to prescribe just and reasonable rules. The provisions of these sections clearly indicate the broad scope of the authority which Congress has conferred upon us, and the important duties with which we are charged, to require, in time of car shortage, a just and equal distribution of cars and the prevention of a distribution which is unjust and discriminatory. United States v. New River Co., 265 U. S. 533.

Respondents, however, contend that paragraph (12) of section 1 shows that we have no jurisdiction over the distribution of cars to carrier-owned or output-contract mines which furnish railway fuel exclusively for at least six months, because such mines are not "served" by a carrier and coal is not "transported" therefrom. The first sentence of this paragraph is relied upon to support this contention. This sentence reads:

"It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply."

The word "served" has no judicially determined or technical meaning which would make it inapplicable to carrier-owned or output-contract mines. We must, therefore, give this word its ordinary meaning. The Standard Dictionary defines it, among other things, to mean "to furnish or provide as with a regular supply at stated periods." "Self-service" is a common expression. To use this word, therefore, to mean the furnishing of cars by a carrier at its own mines or at those the output of which it takes, is to give the word its ordinary and well-accepted meaning. This is the meaning to which we believe the Congress intended. As used in paragraph (12) "served" is a convenient term to show that the provisions of this paragraph apply not only to mines which are located on a carrier's own line, regardless of the ownership or contractual arrangements of such mines, but also to mines which are located off its line and which it customarily supplies with cars.

Respondents also contend that the word "transportation" in paragraph (12) means common-carrier transportation, transportation for compensation, and not transportation of a carrier's own coal

over its own line for its own consumption. They cite as authority Int. Com. Comm. v. Balt. & Ohio R. R., 225 U. S. 326; Santa Fe Ry. v. Grant Bros., 228 U. S. 177; and The Pipe Line Cases, 234 U. S. 548.

256 That "transportation" has not the restricted meaning claimed appears from the use of this word in the second sentence of paragraph (12), which reads:

"* * * During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. * * *"

The counting requirements clearly apply to cars placed by a carrier for its coal at mines on the same date shipping commercial coal, yet this coal is transported by the carrier without compensation. The word "transportation," therefore, as used in paragraph (12) is not limited in its meaning to transportation for compensation, but includes also transportation of the carrier's own coal over its line.

In Interstate Commerce Commission v. Ill. Cent. R. R., 215 U. S. 452, 472, the Supreme Court sustained the rule which we laid down in the Traer case, 13 I. C. C. 451, that cars for railway fuel should be counted at the mines at which they are placed. The contention there, as stated by the Supreme Court, was:

257 "When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce."

The Supreme Court in overruling this contention said, at page 474:

"It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one."

The lower court sustained this contention and in doing so said in C. & A. v. I. C. C., 178 Fed. 596, 602:

"Coal is brought to coal-chutes from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

"Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel."

Thus the court held that we had jurisdiction over cars used for hauling railway fuel over a carrier's own line, on the theory that such cars were instrumentalities of interstate commerce and could be regulated with a view to bringing about a just and equal distribution and preventing an unjust and discriminatory one. Whether the cars were used in common-carrier transportation was immaterial. The cases relied upon by respondents—namely, the B. & O. case, the Grant Bros. case and The Pipe Line cases, supra—relate to what is common carriage and are, therefore, not in point. As to foreign-line fuel cars we call attention to the following in our original report p. 546:

"When a railroad company becomes a purchaser of coal upon the lines of a connection, and ships it to itself as consignee, it is entitled to the same consideration as any commercial shipper or consignee and no more, and this is true when the shipment moves partly over the rails of the carrier that is in fact the shipper or consignee. Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1, 9, Divisions of Joint Rates on Railway Fuel Coal, 37 I. C. C. 265.

238 See also Interstate Commerce Commission v. B. & O. R. R. Co., 225 U. S. 326.

In view of the conclusion which we have reached as to the meaning of the words "served" and "transportation" in paragraph (12), we are of the opinion that its provisions apply to cars placed at carrier-owned and output-contract mines and can be relied upon to show that the Congress exempted such cars from the other provisions of section 1 requiring reasonable rules of distribution, and the provisions of section 3 prohibiting unduly preferential or prejudicial rules. On oral argument counsel for respondents expressed the opinion that we could restrict the assigned-car practice to mines furnishing their output to a carrier for periods of at least six months. They thus apparently admit that mines selling their output to railroads for shorter periods are "served" and the coal hauled in the assigned cars is "transported" within the meaning of the act.

Respondents contend that an assigned-car mine furnishing all of its coal to a railroad for a long period of time is not in competition during such period with unassigned-car mines selling coal to others, and that in the absence of competition we have no authority to make a finding of undue prejudice or unjust discrimination under section 3 of the act. The period which respondents assume, as we previously pointed out, is at least six months. If the period be less, apparently they recognize that competition may exist.

In the Illinois Central case, our authority under section 3 was in issue, and the court sustained our finding of unjust discrimination. Cars were required to be counted although the coal in them belonged to the carrier and was transported by it without compensation for its own use. While respondents attempt to distinguish that case on the ground that, as they contend, only partial-output mines furnishing railway fuel were there dealt with, the principle there established is broad enough to cover this case.

Assigned-car mines which furnish their output for long
259 periods of time to railroad are, at the end of such periods, because of lower costs and better labor conditions which they have enjoyed, in a position to undersell competing unassigned-car mines. The record also shows that railroad-owned mines in many instances sell coal commercially. Such mines may not only at any time dispose of part or all of their product commercially, but may be leased or sold to outside interests, and thus actively engage in selling commercial coal. Moreover, while we do not consider this circumstance essential to our decision in this case, the record clearly shows that there is competition in labor between railroad-owned and output-contract mines on the one hand and comercial mines on the other. We think upon the facts shown of record that we have jurisdiction to deal with the distribution of cars to all of such mines under section 3 of the act. Competition is not an essential element under section 1. Penn Tobacco Co. v. Old Dominion S. S. Co., 18 I. C. C. 197, 200.

Respondents contend that the evidence fails to show that the assigned-car rule is unreasonable under section 1 of the act; that a finding, if any, abolishing the assigned-car practice must rest on section 3; that the Traer case decision was made under that section; and that there has been no showing in this proceeding that justifies us in abolishing the rule laid down in that case.

In making this contention respondents, we believe, overlook the broad provisions of section 1 as to reasonable rules. Moreover, they fail to realize that to abolish the assigned-car rule is not to depart from the principle laid down in the Traer case, but to carry out that principle by preventing altogether the discriminatory practice which was there only partially restricted. We showed in our report, page 553, that "The circumstances surrounding and subsequent to our decisions in the Traer case and Hocking Valley case are such that the practice based upon the rules there announced can scarcely be given the sanctity of long observance in considering the question of reasonableness or undue preference."

Effect of assigned-car rule.—In passing upon the rule before us, it is important to bear in mind the fundamental purpose of
260 the act "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." New Haven R. R. v. Interstate Com. Com., 200 U. S. 361; Louisville & Nashville R. R. v. Mottley, 219 U. S. 467; United States v. Union Stock Yard, 226 U. S. 286. We have already noted the Supreme Court's language in the Illinois Central case as to our power to require "a just and equal distribution and the prevention of an unjust and discriminatory one." The court also refers in that case to the carrier's "duty to make equal distribution of cars," page 477, and "the duty of equality of treatment," page 473. In Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, 88, which

related to assigned foreign railway fuel cars and private cars, we said:

"There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. * * * The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers."

One effect of the assigned-car rule, as we pointed out in our original report, pages 542 to 546, is to diminish the supply of cars at commercial mines. The extent of the diminution in car supply, as we also pointed out, is in dispute and is difficult to state in mathematical terms. Counsel representing the American Railway Association contend that, while on the whole it seems difficult, if not
261 impossible, to name an exact figure which will represent the percentage of increase in the supply of cars to commercial mines which would be brought about by the abolition of the assigned-car privilege; 3 per cent would be more nearly a correct figure than any other which could be named. Opponents of the assigned-car rule on further hearing introduced further evidence on this phase of the case. This showed, among other things, that if there had been a pro rata distribution of all cars in the eastern and central regions of the Pennsylvania, which include that portion of the railroad from Cresline, Ohio, east to New York, the supply of commercial mines for the eight months ended April 30, 1923, would have been increased from 54.23 per cent to 54.82 per cent of the commercial cars ordered, or an increase of 57.81 per cent over the supply received by commercial mines during that period. From September 1 to March 1 during this period the total number of cars available, assigned and unassigned, decreased from 165,016 the first month to 94,280 the last month, and the percentage of assigned cars available to all cars available increased from 25 to 65 per cent. The orders for commercial cars remained almost constant. The following table shows the situation as to car supply on the Cresson and South Fork divisions of this railroad from October 19, 1922, to April 30, 1923:

	Total required	Cars available		Percentage of cars available to cars required
		Assigned	Unassigned	
Cresson division	*Cars*	*Cars*	*Cars*	*Per cent*
Railroad-fuel cars	10,141.2	8,950.0	295.4	90
Private cars	21,257.8	24,447.9	1,082.8	120.1
Commercial cars	141,780.4	12,602.8	38,589.2	29.8
Total	173,179.4	36,980.7	39,977.4	44.4
South Fork district				
Railroad-fuel cars	10,119.1	11,955.5	810.2	82.5
Private cars	20,287.0	30,020.0	242.4	119.7
Commercial cars	87,117.9	13,289.9	25,778.7	31.1
Total	132,524.0	31,265.4	26,831.3	57.2

[1] Includes cars not assigned for railroad fuel but for other reasons not counted against the distributive share of the mines.

262 It will be observed that if there had been a pro rata distribution of all cars, assigned and unassigned, the commercial supply on the Cresson division would have been increased from 29.8 per cent to 44.4 per cent, or an increase of 49 per cent, and on the South Fork district from 31.1 per cent to 57.2 per cent, or an increase of 83.9 per cent.

The supply of assigned and unassigned cars in the various districts of the Chesapeake & Ohio during the first three months of 1923 is shown in the following table:

District	Unassigned cars			Assigned cars		
	Ordered	Furnished	Percentage	Ordered	Furnished	Percentage
New River	14,[illegible]9	27,471.0	79.1	5,[illegible]8.5	5,434.7	91.7
Kanawha	[illegible]7,[illegible]9.4	20,[illegible]2.5	70.5	5,564.0	5,[illegible]8.4	98.4
Coal River	[illegible]7,849.1	11,041.7	69.2	2,971.9	2,712.0	76.0
Logan	[illegible]1,[illegible]6.2	37,[illegible]7.1	92.1	16,245.5	14,[illegible]6.0	89.0
Kentucky	47,[illegible]1.6	14,[illegible]1.1	29.7	6,[illegible]3.0	[illegible]6.3	84.8
Total	355,173.1	110,[illegible]0.0	80.5	35,244.2	30,919.4	87.7

District	Total			Percentage increase[1]
	Ordered	Furnished	Percentage	
New River	[illegible],[illegible]6.4	32,[illegible]8.5	82.8	12.7
Kanawha	7[illegible],[illegible]4.0	25,[illegible]0.9	32.8	9.7
Coal River	[illegible],[illegible]1.7	13,[illegible]4.3	32.5	11.2
Logan	1[illegible],[illegible]1.7	52,[illegible]3.1	39.6	21.5
Kentucky	5[illegible],[illegible]4.6	16,[illegible]8.1	29.4	25.0
Total	[illegible],[illegible]7.4	141,[illegible]0.4	85.4	10.9

[1] Last column shows percentage increase in commercial supply if all cars were distributed pro rata.

The evidence does not show the various classes of assigned cars, except that as to the Logan district it shows the 16,345.5 assigned cars ordered included 9,954.4 cars for Chesapeake & Ohio fuel coal

and the 14,546 assigned cars furnished included 9,286.4 cars for Chesapeake & Ohio fuel coal.

The supply of cars, assigned and unassigned, in the Corning, Drakes, Fultonham, and Kanawha & Michigan districts on
263 the Ohio Central lines of the New York Central Railroad for the first three months of 1923, is shown as follows:

District	Unassigned cars			Assigned cars		
	Ordered	Furnished	Percentage	Ordered	Furnished	Percentage
Kanawha & Michigan	65,633	17,019	25.9	6,026	3,436	57
Drakes	10,513	2,775	26.4	227	140	54.3
Corning	29,172	6,679	23.1	10,638	7,760	72.9
Fultonham	4,713	1,566	29.1	4,653	3,907	84.4
Total	110,031	28,039	27.2	21,543	15,193	70.1

District	Total			
	Ordered	Furnished	Percentage	Percentage increase[1]
Kanawha & Michigan	71,664	20,455	28.6	10
Drakes	10,740	2,915	27.1	1
Corning	39,793	14,439	41.7	36.1
Fultonham	9,366	5,467	58.8	85
Total	131,571	43,126	34.3	28

[1] The figures in the last column show the percentage increase in car supply which commercial mines would have received if there had been a pro rata distribution of all cars.

After weighing the evidence in the light of the various contentions made on this phase of the case, we think our former conclusion that the supply of cars at commercial mines would be increased by abolishing the assigned-car rule is fully warranted. This effect not only clearly appears from the evidence, but also the gross inequality of treatment as between assigned-car mines on the one hand and unassigned-car mines on the other. As we pointed out in our original report, page 556, the result of inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production, and the amount of such increased cost is considerable and important. We think it unnecessary to add to what we said in our original report, page 556, as to the effect of the assigned-car practice, in attracting as many desirable miners as can be given
264 employment to the assigned car mine and away from commercial mines, and in bringing about a more rapid labor turnover at the latter than at the former.

On our original report, page 547, we pointed out that the record indicated that upon the whole the wastage during periods of car shortage, which results from the holding over from one day to the next of cars set for loading, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. We

see nothing in the evidence on further hearing to change our finding on this point.

Contentions as to necessity of assigned fuel cars.—Respondents contend that the assigned-car rule as advocated by them is reasonable and not unjustly discriminatory because under it they are able to secure a regular supply of coal of proper quality at reasonable prices during car-shortage periods while without it they would not be able to do so. Before reviewing the large volume of evidence on this feature of the case it is important to bear in mind that the fundamental purpose of the act is equality of treatment in rates and service, and this principle may not be violated merely because the carrier in that way may operate at less expense. If this were not true a carrier in times of car shortage could restrict its car supply to a few large and well-operated mines on its lines and ignore the remainder. In United States v. Ill Cent. R. R. Co., 263 U. S. 515, the court said, page 523:

"The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. Interstate Commerce Commission v. Chicago Great Western Ry., 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. * * *"

365 That was a rate case, but the principle is applicable in a car-distribution case, that a carrier's self-interest may not override the requirement of equality in car distribution. See also Int. Com. Comm. v. Balt. & Ohio R. R., 225 U. S. 326.

Much of the argument as to economy of operation resolves itself into the proposition that a carrier is able to secure cheaper coal as the result of discriminating in its own favor through the use of the assigned car. As to this it is appropriate to repeat what we said in our report of January 25, 1907, to Congress on "Discriminations and Monopolies in Coal and Oil":

"* * * The prevailing rule is that cars in which fuel coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.

"The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel

cars, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation and gave him an advantage over a competitor who has no order for fuel coal."

While, as we pointed out in our original report, there was lack of evidence to show that railroads had used the assigned-car rule to coerce mine operators into selling their coal at unreasonably
266 low prices, the evidence introduced at the original hearing and upon the further hearing shows that the carriers are able in consideration of furnishing a full supply of cars under this rule to make contracts for coal at somewhat lower prices than they could otherwise make.

Respondents contend that the table in our report of 52 carriers not using assigned cars does not, when considered in view of the evidence which they presented, justify the inference that carriers can secure their coal at reasonable prices during periods of car shortage without the use of the assigned car. However, as to the eight carriers, whose practices were shown on the further hearing, the evidence shows certain significant facts. The Great Northern and Chicago & North Western did not resort to the assigned-car practice in securing their fuel. The St. Louis-San Francisco in securing approximately 75 per cent of its coal from mines on its own line did not follow this practice, and followed it only to a limited extent, if at all, in securing the remainder of its coal from mines on other lines. The Atchison, Topeka & Santa Fe secured over one-third of its supply of coal without the use of assigned cars. The Caroline, Clinchfield & Ohio did not follow this practice in 1920 or in October, 1922, although it did do so the latter part of that year. During 1920 and until the latter part of 1922 the Seaboard Air Line obtained practically all of its coal without assigned cars. The Delaware, Lackawanna & Western obtained 40 per cent of its coal in this manner. Our table shows that the Atlantic Coast Line and the Detroit & Mackinac did not follow the assigned-car practice in 1920 and were not following the practice on October 1, 1922, and that the Richmond, Fredericksburg & Potomac, while following the practice in 1920, was not using assigned cars on October 1, 1922. This showing remains uncontradicted, except that in the latter part of 1922 the first two carriers secured coal on the Chesapeake & Ohio in cars placed under the assigned-car rule, while the third carrier continued to secure its coal on that road without assigned cars. As to the remainder
267 of the 52 carriers listed in our table as not using assigned cars, the showing made therein is neither contradicted nor modified. Among these are certain important roads like the Union Pacific, the Buffalo, Rochester & Pittsburgh, and the Mobile & Ohio.

The evidence on further hearing as to carriers other than those shown in our table furnishes in many instances added support for the conclusion that carriers in car-shortage periods may secure their coal at reasonable prices without the use of the assigned car. As

illustrative of this, the Chicago, Burlington & Quincy, between the time of the original hearing and the further hearing in this case, secured over half of its coal without the use of assigned cars, during a period of sustained car shortage. This was true also in previous car-shortage periods, as shown at the original hearing. The New York Central secured about 26 per cent of the coal it consumed without the use of the assigned car. The Pittsburgh & Lake Erie, a part of this system and an important coal-loading carrier, did not follow the assigned-car practice in securing its fuel in the year 1920. The Michigan Central, also a part of the system, secured since the period of Federal control, a substantial portion of its fuel in Michigan without the use of assigned cars, and from 1912 to 1917 procured all of its coal without assigned cars.

Many large and important carriers in representative sections of the country have secured their coal during periods of car shortage without resorting to the use of assigned cars, and many others have secured large portions of their fuel supply in the same manner. The evidence in the original record and upon the further hearing also shows that public utilities and quasi public utilities have been able to secure their coal without the use of the assigned cars. We pointed this out in our report, pages 552 and 553.

There is a large volume of evidence in the original record and in the record upon the further hearing as to the methods which carriers adopted, and which they could adopt in securing their fuel without the assigned-car rule. These include greater storage
968 of coal during periods of inactive demand and a wider distribution of fuel contracts among producing mines, with a provision in some cases that railroad coal shall be delivered in preference to coal for other customers. While the carriers contend that these methods are impracticable as substitutes for the assigned-car rule, the experience of carriers and other public utilities and quasi public utilities, which do not depend upon this rule in securing all or a large part of their fuel, and the other evidence in the record on this subject, convince us of the practicability of securing railway fuel at reasonable prices in the absence of the assigned-car rule.

As stated in our original opinion, however, emergencies may arise when for a time a carrier may be unable to secure its coal. But we are not here dealing with the question of car distribution under the emergency provisions of section 1, paragraph (15). In our original report we expressly pointed out that the rule which we prescribed was not to preclude us from authorizing necessary assignment of cars in case of emergency. The question of a just and nondiscriminatory rule under the provisions of section 1 and section 3, with which we are now dealing, is a different question from that of a rule to be prescribed in case of emergency. The distinction is recognized in paragraph (15), where it is provided that we may suspend car-service rules at such times.

In the petition for rehearing filed by the American Railway Association it was alleged that the abolition of the assigned-car rule would add more than $100,000,000 a year to the operating expenses of the carriers, which must ultimately be met by the public. No figures were offered to show how this sum was computed, and there was a general failure of evidence to support this contention. As we have previously indicated, carriers which have not used the assigned-car rule in securing all of their coal, or a large part thereof, have been able to do so at fair prices. Moreover, as the result of inequality in working time caused by the assigned-car rule the costs of commercial mines are increased and the public in consequence
269 must pay higher prices for coal. We referred to this in our original report, pages 550 and 551. It seems probable that, as one of the consequences of abolishing the rule, carriers will increase the storage of coal during periods of free car supply and thus not only secure coal at low prices but make more equipment available for revenue service during periods of car shortage. The evidence shows that many carriers, as well as public utilities and important industries, store large quantities of coal and are able to do so at reasonable expense. Storage by railroads and others in periods of car surplus tends to equalize demands by operators on railway equipment throughout the year, and to prevent periods of extreme car shortage during which, because of the great demand for coal, inefficient high-cost mines spring into operation, and the public is required to pay excessive prices for coal.

It has been suggested in this proceeding that elimination of the assigned-car rule would be an unwarranted interference by us with the carriers' right to purchase coal where and from whom they please. A similar contention was overruled in the Illinois Central case, 215 U. S. 452, 477, in which the court said:

"The right to buy is one thing and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things."

Special types of equipment.—On further hearing, the contention is made that the side-dump cars of the Hocking Valley and the ballast and stock cars of the Atchison, Topeka & Santa Fe are special types of equipment which are used exclusively by these carriers in hauling their coal and can not be used by commercial operators at all, and that we are without authority to deal with such cars for the reason that—

Cars of this type have never been impressed with the char-
270 ter of common-carrier instrumentalities. They are not used in commerce at all; they are used only in performing the private work of a railroad company.

The Hocking Valley cars were in commercial service for many years before they were put in fuel-coal service, and they are placed at partial-output mines selling commercial coal and are counted and

distributed on a pro rata basis. The Atchison, Topeka & Santa Fe cars are placed at mines of this description and are counted under the assigned-car rule, and such cars may be unloaded by dumping like ordinary coal cars. The side-dump cars and the stock and ballast cars constitute part of the available equipment of these carriers for commercial shipments, and come within the class of equipment as to which Congress requires "a just and equal distribution and the prevention of an unjust and discriminatory one." Illinois Central case, 215 U. S. 452, 474.

It is contended that if the assigned-car rule should be abolished carriers will be deprived of the advantage of using a particular type of cars especially adapted for unloading at coaling stations. Our order, however, does not prohibit such use, but merely placement in excess of the mine's distributive share. The Hocking Valley, as we have just pointed out, now uses its side-dump cars in securing coal from partial-output mines on a pro rata basis of distribution.

Railroad-owned mines.—In what we have said we have dealt with railroad-owned mines as well as other mines. We shall here refer briefly to railroad-owned mines alone.

A statement filed by respondents shows 23 railroads owning mines. The ownership in nearly all cases is through subsidiary companies. Eleven[1] of the 23 had mines producing commercial coal as well as fuel coal. Four, the Chicago Great Western, the Chicago, Rock Island & Pacific, the Richmond, Fredericksburg & Potomac, and the Delaware, Lackawanna & Western, had mines located on other railroads. Five, the Chicago & North Western, the Great
271 Northern, the Minneapolis & St. Louis, the Richmond, Fredericksburg & Potomac, and the Union Pacific are carriers which do not resort to the assigned-car practice. The Canadian National should be added to the four having mines on other lines.

Certain of the carriers owning mines emphasize the importance of having these mines from the standpoint of economy and efficiency. The Chicago, Burlington & Quincy closes down its mine during periods of car surplus, and distributes its purchases among commercial mines to help such mines and thus produce more revenue freight. Moreover, the evidence indicates that in some instances at least, coal can be secured more cheaply from commercial mines than company-owned mines because of the greater distance necessary to haul the coal in the latter case. The Atchison, Topeka & Santa Fe does not consume the output of one of the mines which it owns, because to consume it all would require hauling the coal unreasonable distances. The Chesapeake & Ohio mines are on a branch line. If all the coal this company consumes should be taken from these mines, it would have to be hauled into and through other coal-loading districts on the same railroad.

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[1] Atchison, Topeka & Santa Fe; Baltimore & Ohio; Central of Georgia; Chicago, Rock Island & Pacific; Erie; Great Northern; Minneapolis & St. Louis; Missouri Pacific; Northern Pacific; Southern Pacific; and Union Pacific.

PRIVATE ASSIGNED CARS

Much of what we have said concerning assigned cars for railway fuel is applicable to private cars.

Nearly all of the private-car owners who filed petitions for rehearing appeared in the original proceeding or had subsidiary or affiliated companies which did. They stated that the evidence which was introduced there did not fully disclose the necessity for the private assigned car in the various classes of industries relying upon it and contended that they should therefore be permitted to make a complete showing on this subject.

On the further hearing much evidence was introduced by such owners as to their individual situations and the economic
272 necessity in each case of the assigned private car. The widest scope was allowed in the production of testimony as to these individual situations and needs. The names of the companies introducing evidence and the number of cars owned are as follows:

Bethlehem Steel Corporation	3,972
Steel Company of Canada and affiliated companies	400
Carnegie Steel Company and other subsidiaries of United States Steel Corporation	5,200
Pittsburgh Plate Glass Company	200
Ford Motor Company and subsidiary company	800
Youngstown Sheet and Tube Company	1,234
International Harvester Company and subsidiary	500
Semet-Solvay By-Product Coke Company	550
Chicago By-Product Coke Company	650
Rainey Wood Coke Company	400
Donner Union Coke Corporation	500
Berwind-White Coal Mining Company and subsidiary company	4,078
Westmoreland Coal Company	2,019
Public Service Electric Company	600

These companies owned about 21,000 of the total 29,250 coal and coke cars privately owned as of October 1, 1925.

In addition to the evidence offered by private-car owners, certain public utilities of the city of New York, which received large quantities of coal in private cars owned by others, introduced evidence to show the necessity of the private assigned car. With the exception of the National Coal Association, the same associations which opposed the railway-fuel car opposed the private assigned car and in addition to these there were, among others, the Harlan Coal Operators' Association and the New River Coal Operators' Association.

Contention as to our authority.—Some of the private-car owners content that the interstate commerce act recognizes private cars as legitimate, that the right of the owners to use such cars includes the right to have them placed at designated mines without restriction unless such use of cars result in preferential use of other equipment such as locomotives or tracks, and that we have no authority to abolish the assigned-car rule and require pro rata distribution, because, as they contend, the facts do not warrant us in finding that the use of such cars will result in preferential use of facilities other than cars.

273 In our original report, pages 554 to 559, we referred to various decisions in respect to private cars, and said:

"Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation. Throughout we have recognized that when the carrier permits the use of the private car upon its rails, it is responsible for the manner in which the service is conducted in that car, and that the car becomes in all respects as if it were one of the general stock of those owned by the carrier, and subject to the same liabilities and responsibilities as to the use in interstate transportation."

A statement of the general principles which should be applied is also to be found in United States v. Baltimore & Ohio Railroad Co., 165 Fed. 113.[1] In that case the Circuit Court of Appeals for the Fourth Circuit in dealing with the distribution of privately owned cars to coal mines called attention to the provisions of section 1 requiring carriers to furnish transportation upon reasonable request and to the definition of "transportation" in section 1 as including cars and other vehicles "irrespective of ownership or of any contract express or implied for the use thereof," and then proceeded as follows, pages 122 and 123:

"In passing upon the questions involved, it should be borne in mind that the statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the ship-
274 per. The duty thus enjoined cannot be evaded by the carrier by claiming that it is not the owner of the portion of the cars carried over its lines. The duty of furnishing equal facilities relates to and involves purely the question of transportation, and when we are called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated. The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we cannot consider, inasmuch as the statute was not enacted for the purpose of promoting the interests of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution

[1] The case was later reversed by the Supreme Court in Baltimore & Ohio R. Co. v. Pitcairn, 215 U. S. 481, but on the ground alone that the lower court had no jurisdiction to pass upon the reasonableness of car-distribution rules, since the question was an administrative one for the commission.

of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.

It is made the duty of the carrier to move the product of the shipper, and in doing so, if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief accorded by section 23 of the act. If, as in this instance a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would
275 be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which it left entirely with the carrier; but, while such is the case, it is equally true that the carrier cannot, by any such arrangement, by indirection, accomplish that which is prohibited by the statute.

The private-car owners concede that the assigned-car rule established by the Hocking Valley case and Traer case is reasonable and lawful. In one of the briefs in behalf of many of such owners, it is stated that this rule "has the approval of the Supreme Court of the United States. Int. Com. Comm. v. L. C. R. R. Co., 215 U. S. 452." While the court in that case did not expressly pass upon the rule in so far as private cars were concerned, it may be considered as authority for the proposition that we have power to make such a rule. The lower court in Chicago & Alton R. Co. v. Int. Com. Comm., 173 Fed. 930, in sustaining the rule as to private cars said, page 932:

A charter duty of railroads is to provide cars, as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from dis-
276 criminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who

owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

The fundamental principle which has governed us in dealing with private cars is that such cars, being paid for by the carriers through allowances to their owners, are to be treated as part of the carrier's equipment, and may not be so used as to bring about unjust discrimination or unreasonable practices. Prior to the Hocking Valley and Traer decisions private cars were not taken into account at the mines to which they were assigned. Such mines received in addition their full pro rata share of system cars in the same manner and to the same extent as if the private cars were nonexistent. By these decisions, however, private-car owners who did not have sufficient private cars for placement at their mines to exceed the distributive share of such mines were deprived of the advantage of ownership of the cars just as private-car owners claim here that they would be deprived of the advantage from the ownership of their cars if the assigned-car rule should be abolished and the placement in excess of the distributive share of the mines be prohibited. The Interstate commerce act not only confers authority upon us to restrict the preferential use of private cars as was done in those decisions, but authorizes us to prohibit altogether such preferential use. 277 United States v. New River Company, supra, and cases therein cited. As we pointed out in our original report, page 561:

"A private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars, or is entitled to no preference whatsoever on account of that ownership, and a compromise is untenable."

The contention is made that paragraph (12) of section 1, which was incorporated into the interstate commerce act by transportation act, 1920, limits our power to change or extend by further limitation the rule laid down in the Traer case and Hocking Valley case. That this was not the intent of Congress, we think, is clear. In this connection, it is to be observed that the Supreme Court in United States v. Pennsylvania R. R. Co., decided November 17, 1924, used the following language:

"* * * There is nothing in the act to regulate commerce as originally enacted, or in transportation act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the commission's powers to prevent unjust discrimination. * * *."

Private cars which are paid for by carriers for use and are used on their lines are clearly "facilities possessed," and come within the broad powers conferred upon us by the statute to prevent unjust discrimination.

As to the contention of private-car owners that they are entitled to unrestricted use of their cars unless this involves some preferential use of facilities other than cars, we may repeat here what we said in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, at page 92:

"The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transport-
278 ing it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. When any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the commission has said on those questions in its formal decisions."

In the report of the American Railway Association conference committee to the United States Coal Commission dated June 1, 1923, which is in the record, the following appears:

"'Coal car shortage,' while a term generally used, is commonly a misnomer; 'transportation shortage' would be more exact or more properly descriptive. From the viewpoint of the mine management a 'car shortage' exists when cars are not placed on mine tracks in sufficient quantity to fill car orders. From the viewpoint of the railroad management the situation may rather be considered a 'transportation shortage,' for at such a time there may exist no 'car shortage' on the railroad as a whole. That is, even though all car orders are not filled there may be in the road's possession as many coal cars in the aggregate as in previous periods when the mines it served loaded a greater amount of coal and the needs of such mines for cars were more adequately or fully met.

279 "When labor disturbances cause abnormal demands for coal to be delivered in certain sections of the country within a certain period, the coal moves to meet these demands via routes and gateways in quantities far above the normal, or average, movement through such channels and also via unusual routes. Because of this abnormal coal movement yard tracks, main tracks, terminals, lake and tidewater piers, and various other facilities become overtaxed or congested, with a consequent slower movement and longer

turn-around of cars. This results in what the mine management terms a 'car shortage.'"

As we pointed out in the Rail and River case, "A shortage in cars usually, if not invariably, is accompanied by a shortage in some one or more of the other facilities of the carrier." Locomotives, tracks, employees, terminal facilities, etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities. Some of the more aggravated cases of discrimination shown under the assigned-car rule were during car shortages, resulting in part at least from lack of motive power and limited track facilities. Some of these cases were cited by private-car owners as examples of the necessity of the assigned car. As illustrative of this, the United States Steel Corporation, International Harvester Company, Chicago By-Product Company, and Ford Motor Company, through subsidiary companies, operate large mines in the Harlan district of the Louisville & Nashville in Kentucky, and severally own about 4,000 private cars used in serving their respective mines. The evidence shows that this carrier was unable, because of limited track facilities among other things, to handle all the cars required by the mines in this district, and yet private-car mines received practically full car supply, while other mines in the district received less than a 30 per cent supply for substantial periods. Other divisions of the same railroad not
280 only had a larger precentage of cars than the Harlan district, but at times during the car shortage it was shown that this carrier notified connections not to deliver empty cars to it.

In determining upon a just and workable rule we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power, etc., and that to permit private-car owners to have their cars placed at designated mines in excess of the pro rata allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own, while to require pro rata distribution of cars is to bring about a just and nonpreferential distribution in conformity with the fundamental requirements of the act.

Contention as to necessity of private assigned cars.—As we have indicated, much evidence was introduced by private-car owners to establish the necessity of the use of private cars under the assigned-car rule. Much emphasis was laid upon the technical processes involved in the making of by-product coke and the necessity of having a regular supply of coal of proper quality for coking purposes. The principal witness on this subject was the president of the Seaboard By-Product Coke Company and the Chicago By-Product Coke Company. The situation as to the former is typical and will be briefly summarized:

The Seaboard By-Product Coke Company operates 165 by-product coke ovens at its plant in Kearney, N. J., in which it uses about a million tons of coal a year in producing about 750,000 tons of coke.

In this process gas and other by-products of the coal are recovered. The gas is supplied to a public-service gas company. Of the coke 60 per cent is sold to public utilities for the manufacture of water gas, and the remainder is sold to industrial and domestic customers. The by-product company is under contract to furnish daily a fixed amount of gas to the gas company, which under its franchise must supply gas to the public. Continuous operation of the by-product plant is necessary in order to supply the gas contracted for
281 and to furnish a regular supply of coke to gas companies for the manufacture of water gas. By-product ovens are lined with specially molded silica brick, and require a gradual heating of from six to eight weeks to put them in blast. Rapid heating will expand the oven walls, destroy them, and require rebuilding at substantially replacement cost and with long delay. Sudden shutdowns will likewise wreck the ovens. The witness estimated the cost of replacement to be from $500,000 to $800,000, depending upon the size of the plant. It is important to have a continuous supply of uniform grades of freshly mined coal from selected mines in order to comply with specifications as to gas and to produce coke suitable for water gas manufacture and for the metallurgical and domestic trade. Unknown and varying coals will cause serious injury to the ovens by reason of expansion or crumbling during the coking process. Determination of correct mixtures of coal is a delicate operation, requiring much time and many tests in test batteries of ovens. The company ordinarily keeps in storage about two months supply of coal, to guard against a breakdown in transportation or trouble at the mines. Such coal must be mixed with freshly mined coal to produce satisfactory results.

In 1919 and 1920 the Seaboard By-Product Company was unable, because of car shortages then existing, to secure suitable coal under contracts which it had. Additional coal was purchased to keep its plant in operation, but this was of poor quality and resulted in bad coke. In 1920 the company acquired 350 cars, and has been able to have these cars assigned and has thus secured suitable coal and operated its plant satisfactorily during car-shortage periods.

In the last 10 years over $200,000,000 has been invested in by-product coke plants and their accessories, and a tremendous saving in natural resources has resulted from the use of this process. The by-products thus saved are estimated to be worth about $4 for each ton of coal coked.

The steel companies also emphasized the necessity of pri-
282 vate assigned cars in securing coal of proper quality for the by-product coke plants which they operate in connection with the manufacture of steel. Large quantities of gas are supplied by such companies to public utilities. It is important in producing steel to have coke made from coal of proper physical structure and metallurgical content. Sulphur and phosphorus in the coal used for coking will continue throughout the process and impair the

quality of the finished steel. Many of these companies own outright or through their subsidiary companies mines selected because of the suitability of the coal produced for steel making and use their private cars for transportation of the coal from their mines to their own plants. Some of such mines ship only to the industries which own them. When coal can be obtained and stored the steel companies generally carry a sufficient supply in stock to take care of their requirements during any ordinary period of irregular coal supply or interrupted transportation service.

The Berwind-White Coal Mining Company and its subsidiary, the New River & Pocahontas Consolidated Coal Company, own 4,078 private cars which are used in transporting coal from mines which the former company owns on the Pennsylvania and from mines which the latter company owns on the Chesapeake & Ohio. The subsidiary company also owns mines located on the Norfolk & Western. These companies supply large quantitiese of coal to railroads and public utilities and to steamship companies for bunker coal. They have owned the cars for many years, and contend that such cars under the assigned-car rule are a necessity in order to insure regular delivery to their customers.

Evidence of similar character was introduced by other private-car owners. While all of them contend that private assigned cars are necessary in their industries, and in some cases allege that disaster will result if they are deprived of the assigned-car privilege, the record shows that many of such owners secure large quantities of coal without the assigned car. As illustrative of this, the Carnegie Steel Corporation and other susidiaries of the United States Steel
283 Corporation normally receive by rail 20,000,000 tons of coal annually, one-half of which is used in their mills for producing gas and steam and one-half in their by-product coke ovens. These companies own 5,200 coal cars. Of the 20,000,000 tons 5,000,000 are moved in these cars. About 12.5 per cent of the 10,000,000 tons of coal for gas and steam and about 37.5 per cent of the 10,000,000 tons used for by product coke are moved in this manner. Another illustration is to be found in the Pittsburgh Plate Glass Company, which owns about 269 cars and uses them in securing coal for its plants in the Pittsburgh district, but obtains coal in system cars for its other plants in Indiana, Ohio, and Missouri. The Youngstown Sheet & Tube Company obtains 49 per cent of its coal in system cars. This includes both high-volatile and low-volatile coking coal. The New York Edison Company and the Consolidated Gas Company of New York each receives about two-thirds of its coal in system cars. Large quantities of coal are secured by private-car owners from mines on the Norfolk & Western which does not handle private coal cars during car-shortage periods or at any other time. The evidence presented showed that many public utilities, including street railways, obtained their coal without private cars. It further shows that many mines in the districts where private cars are used

produced coal for by-product coke, bunker coal, and other kinds of coal in competition with that moved in private cars.

It is to be observed that many of the private-car owners appearing in this case did not purchase cars until the abnormal period following the termination of Federal control of railroads. The following companies, for example, first acquired their cars in 1920: Steel Company of Canada and affiliated companies, International Harvester Company and its subsidiary company, Bethlehem Steel Company, Youngstown Sheet & Tube Company, and Seaboard By-Product Coke Company. The Pennsylvania Coal & Coke Company acquired its 1,000 cars between the time of the original hearing in this case and the future hearing. The president of this company at the original hearing opposed the use of private cars. 1,004
284 cars of the Ford Motor Company and its subsidiaries were also acquired subsequent to our original hearing in this case.

Many of the private-car owners deal with the contention of opponents of the private car that mines supplied with private cars have better working time than unassigned-car mines, by saying in a brief which they filed:

"Only in a car shortage period, however, can the ownership of private cars be a matter of moment, for at all other times all mines are supplied in full of all car requirements. While it is a fact that since 1916 coal-car shortages have been common, that is not the normal situation. Once we are out of our war and postwar difficulties, the opposite condition, one of coal-car surplus, may be more regularly contemplated."

The statement is justified by the record.

The fundamental problem is to determine whether differences in transportation conditions justify the inequality of treatment resulting from the assigned-car rule. The evidence which has been presented as to the economic necessity of individual shippers or classes of shippers does not, we think, warrant us in concluding that this inequality of treatment is justified under the provisions of section 1 and 3 of the act. Compare Rates and Charges on Grain and Grain Products, 91 I. C. C. 105. In case of emergency we may grant relief under the provisions of paragraph (15), section 1. What is reasonable action under that section, however, as we pointed out in our discussion of fuel cars, is a different question from the one presented here.

Extent of discrimination.—We have already dealt generally with the discriminatory effect of the assigned-car rule as applied to both fuel cars and private cars. Opponents of this rule introduced evidence to show the adverse effect of the rule in respect to private cars, particularly on the Louisville & Nashville, the Chesapeake & Ohio, and the Pennsylvania. It was shown that during car-shortage periods private-car mines received practically a full car sup-
285 ply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars

ordered. Private-car owners themselves, in introducing evidence as to the necessity of the assigned-car privilege, showed in many instances the discriminatory effect of the rule. During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate. As illustrative of this, the Fordson Coal Company, a subsidiary of the Ford Motor Company, had a car supply of approximately 22 per cent at its mine on the Louisville & Nashville for the six months' period prior to the first placement of its private cars at its mine in February, 1923, and was able to produce only about 34,000 tons of coal a month, while in March with practically a full supply of private cars it was able to produce about 72,000 tons, although the car shortage continued. The costs per ton were reduced from about $4 in November, 1922, and $3 in January, 1923, to $1.95 per ton in March, 1923, and labor at the mine was better satisfied. During the period when the Fordson Coal Company was dependent upon system cars other private-car owners in the same district received practically a full supply of private cars at their mines.

Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they were willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. The Westmoreland Coal Company showed, for ex-
286 ample, that for the two years and nine months ending September 30, 1923, the revenues received for the use of its 2,019 cars were $784,424, expenses for repairs amounted to $820,755, total expenses including interest and depreciation amounted to $1,329,488, and the net loss to the company was $545,064, or a loss per ton of coal handled in private cars of 18 cents in 1921, 13 cents in 1922, and 8 cents in the first nine months of 1923. Private-car owners, it is to be observed, use their cars throughout the year, both in periods of car shortage and in periods of full car supply.

As to the contention that the use of private cars during car-shortage periods releases railroad cars for commercial mines, which otherwise would have to be placed at private-car mines, "this overlooks the fact," as we pointed out in our original report, "that particularly in time of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more important to him than a slight addition to his allotment effectuated by giving his neighbor and competitor a better car supply." Furthermore, if private cars should be withdrawn from carrier service and the remaining supply

of cars should be inadequate, we have power under the act, as we also pointed out in our report, to require the carriers to furnish an adequate supply.

Contention as to impairment of investment.—Some of the private-car owners contend that they have invested many millions of dollars in reliance upon the rule laid down in the Hocking Valley case and Traer case, and that if we should now prohibit placement of such cars in excess of the pro rata allotment of the mines to which they are assigned or consigned, we would take away the only advantage of such cars and in practical effect wipe out the investment which has been made.

In our original report we did not find that the use of private coal cars should be prohibited or that they should not be placed at the mine to which they were consigned. What we did prohibit was the placement of such cars at a mine in excess of the pro rata share
287 of available cars. Private-car owners were left free to continue to use their cars and to have them so distributed to designated mines as not to exceed the pro rata share of such mines. That large sums may have been invested in reliance upon a rule which is unreasonable and unjustly discriminatory or may become or be found so under the interstate commerce act does not mean that we are powerless to change the rule and prescribe a just and nonpreferential one. Douglas v. C., R. I. & P. Ry. Co., 21 I. C. C. 97, 101; So. Pac. Co. v. I. C. C., 219 U. S. 433; and Louisville & Nashville Ry. Co. v. Mottley, 219 U. S. 467.

If we permit the assigned-car rule to continue, it is reasonable to expect that the number of private cars will increase, and, as we said in our original report, page 559:

"The result is not only an increasing gross inequality between users of this form of equipment who are able to afford the very considerable expense in procuring and maintaining such equipment, reflected immediately in the disproportion between the amount of their output or consumption, as the case may be, but also that the available facilities of the railroad carrier other than cars—locomotives, tracks, and terminals—are taken up in great degree by such classes of preferred users, so that the commercial mines are and will find themselves unable to procure transportation for even the ratable share of the cars which the carrier owns and sets for them."

Upon the facts shown of record we affirm the findings in our former report, 80 I. C. C. 520, and find and conclude that in the distribution of cars for transportation of coal among the bituminous-coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, or whether owned or leased by or furnishing their entire output to a respondent, any rule, regu-
288 lation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars

or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars is, and for the future will be, unjust and unreasonable and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall prevent the assigning of privately owned cars or cars for railway fuel to designated mines, provided such mines are not thereby given more than their pro rata share of available cars. It is also not intended that this finding shall preclude the commission hereafter in proper cases in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier or upon the same division when the order or direction for placement shall so provide.

989 The effective date of our order entered in this proceeding June 13, 1923, has been postponed until January 15, 1925. The statutory period of notice is not less than 30 days. We will enter an order making that order effective on March 1, 1925.

Eastman, commissioner, concurring:

I concur in the majority report, except so far as it sustains the conclusion of the original report with respect to the interpretation of paragraph (12) of section 1 of the act. My views with respect to that paragraph were stated in my former separate expression, 80 I. C. C. 520, 563, and to these views I adhere. Commissioner Campbell joints me in this expression.

Hall, chairman, dissenting:

The considerations which prompted my dissenting expression appended to the former report, 80 I. C. C. 520, at 564, are fortified and confirmed by the additional record now before us. I can not escape the conviction that the majority have gone outside of transportation conditions, and thus outside of the proper scope of our powers, to make their findings of unreasonableness and undue prejudice. To my mind these findings are baseless, without warrant in

fact or law, and I can not refrain from saying so when, under guise of a decision by this commission, they become armor, shield, and sword for a grave menace to the common welfare. Those who have experience in such matters well know that no workable substitute has yet been devised for the assigned car in supplying carriers with necessary fuel during periods of car shortage, and that if and when those periods come our priority orders must require what is here condemned by the majority as unlawful.

The private car, as my brother Daniels observed in his dissent from the former report, is not an outlaw. It has its uses at all times, and not merely in times of emergency. Under proper regulation, such as we have devised or can devise, it should continue to
290 perform its important functions. The power to tax may be the power to destroy, but that is not true of the power to regulate.

Potter, commissioner, dissenting:

I am unable to agree with the majority report on further hearing. I set forth my views at some length in my former dissent, and would not find it necessary now to elaborate were it not for the additional facts developed upon the further hearing, which to my mind demonstrate the unsoundness of the majority view.

There are two aspects of this proceeding which were brought into brighter light upon further hearing. One is the propriety and necessity for assigning cars at railway-owned mines or at total-output contract mines located upon the line of the owning or contracting carrier where such contract extends over a considerable period of time. It has been made to appear that to so assign cars is squarely within the intent of Congress in enacting paragraph 12 of section 1 of the interstate commerce act, and in accordance with the view of the commission which recommended the enactment of that section because such assignments were essential and for the express purpose of sanctioning them. The other aspect is presented by the additional testimony as to the importance of the use of the private car as essential to certain lines of industrial development, and particularly to the by-product coking industry and the ramifications thereof. In my original expression I alluded to the effect of the majority report, if not set aside by the courts, upon the steel industry and certain others. The additional testimony upon further hearing demonstrates that the majority report, if given effect will attack in a most disastrous way a vast and growing industry based upon the by-product coking process, which is perhaps the most glorious achievement of this country along scientific lines.

ASSIGNED CARS FOR RAILWAY FUEL

Many of the ills with respect to the assigned car for railway fuel arose from the day-to-day assignment or, stated
291 differently, at mines from which the carriers secure only a part of their fuel requirements. In the original report the

majority set forth the rules which the carriers at that time advocated. These rules followed a literal compliance with the rules prescribed by the commission in the Hocking Valley case and Traer case, with the added proviso that cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission would be designated as "assigned cars." Under a literal interpretation of our decisions in those cases it would seem that the day-to-day assignment was permissible. In them we stated that where a carrier owned the mine, or contracted to take its entire output, the cars need not be counted. We did not specify the period of time for which such total output was to be taken. Many of the carriers, in apparent compliance with these decisions, took the output of certain mines on a day-to-day basis, and furnished such mines on such days during car-shortage periods cars in excess of the pro rata share to which those mines would have been entitled if shipping wholly commercial coal. The next day or days such mines would again be placed on the commercial basis, but the excess cars placed at the mine on the day on which the railroad took the entire output were not taken into account; that is, there was no equalization effected on the subsequent days when cars were placed for commercial loading. The result was, that such a mine undoubtedly secured a preferential car supply on such days on which it supplied its entire output to the carrier.

The record indicates that some of the operating officials of the carriers did not comprehend what was embraced in the term "assigned car." This was emphasized by an exhibit filed subsequent to the hearing, which is a compilation of replies made by certain of the respondents to an inquiry addressed to them by the car-service division of the American Railway Association. These replies in some instances contradict the oral testimony given by witnesses for the same carriers. This misunderstanding, and the abuses of the rules
292 which followed therefrom, makes it certain that some uniform rule should be adopted. This is now recognized by the respondents. Upon the further hearing they did not insist upon the right to assign cars at partial-output mines, but insisted upon the right to assign cars at railroad-owned mines, or at those from which they take the entire output over a substantial period of time, thus eliminating those mines entirely as effective competitors of mines shipping coal commercially.

In the original majority report the history of paragraph (12), section 1, of the interstate commerce act is set forth in some detail. From what is there stated it seems clear that what the Congress intended was not to prohibit the assignment of cars at railroad-owned mines or at total-output mines, but that it clearly recognized, as this commission has in numerous decisions, that the carriers were at liberty to place cars at such mines without regard to the distributive share to which those mines would be entitled if shipping coal commercially.

The language of paragraph 12, it seems to me, is clear on this point. It provides that it shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. The first question to be determined is whether railroad-owned mines or total-output contract mines are served by the carrier, and therefore whether there is any duty upon the carrier to make just and reasonable distribution of cars for transportation of coal amongst such mines. A railroad sells transportation. That is its function. It does not sell transportation to mines which it owns, or to those from which it has contracted to take the entire output over a long period of time. Webster's Dictionary defines the word "serve" to mean "to work for, to labor in behalf of, to be in the employment of, etc." The first sentence in paragraph 12 relates to carriers which serve coal mines.

293 It seems clear that when a carrier places at its own mine, on its own line, or at a mine on its line from which it purchases the entire output, such coal to be used as company fuel, the railroad does not serve the mine. On the other hand, the mine serves the carrier. The seller serves the buyer. The mine sells its services and product, and serves the carrier for compensation. The merchant serves his customers. The gasoline station serves the automobile owner when it place gasoline in the automobile tank. When a railroad sells transportation to a coal producer it serves the latter, but when a coal mine sells coal to a railroad its position is reversed, and the coal mine then serves the railroad. The fact that the railroad supplies some of the instrumentalities for removing its own coal from the mine does not change the relation. If a retail coal dealer sells coal to a householder the relation of buyer and seller is not changed by reason of the fact that the buyer brings his own conveyance and takes the coal home. The difference is merely in the extent of the service rendered by the seller. It seems to follow that when a railroad contracts with a mine to supply it with coal over a substantial period of time, or when the railroad owns the mine which supplies it with fuel coal, the coal mine becomes the servant of the railroad for hire, and the railroad by placing cars, which for the time being are company-service cars, at the mine for loading coal, is serving itself just as much as when it places cars at a coal-stock pile to be loaded by its regular employees.

In both instances the loaders are serving the carrier; in the one case the employee sells his service, in the other he sells his service plus his product. It should be noted here that freight service supplied by a railroad is made up not only of human labor, it includes coal, oil, or some other fuel which is converted into and supplied in the form of energy so that even when a railroad serves a coal shipper by transporting its product it also supplies coal as well as human labor. The foregoing only applies to owned or long-term contract mines located upon the line of the owning or contracting carrier's

line. The needs of the foreign carrier with respect to its fuel
294 supply are, if anything, more urgent than those of the carrier which has coal mines located upon its line. Any rule, therefore, which is adopted with respect to the assignment of system cars should likewise apply to the assignment of foreign railway fuel cars.

The opinion of the majority relies upon the decision of the Supreme Court of the United States in Interstate Commerce Commission v. Ill. Cent. R. R. Co., 215 U. S. 438, as sustaining the position that we have authority to regulate the supply of cars at railway-owned mines or at total-output contract mines, even where that contract extends over a long period of time, and they quote at some length from the decision of the court to sustain that view. The question before the court in that case, however, was whether we were correct in our finding that fuel cars, both system and foreign, at partial-output mines and private cars should be counted in the distribution of available cars. The question of assigning cars at railroad-owned mines or at total-output mines was not before the court. That decision seems to hold that under section 1 we have the power to control the facilities of the carrier, even though used for its own private purpose, where necessary, to avoid undue preference and prejudice under section 3. It is conceded in this record that the only prejudice or discrimination as between a railroad-owned mine or a total-output mine and the mine which ships its coal commercially is in the labor market, or, as stated by one of the counsel at the argument, competition in the upkeep of the mine or ability to purchase coal advantageously as the assigned-car mine produces it, whether it be classified as labor, supplies, or overhead.

In the prior report the majority found that there were more than enough miners to produce coal for all purposes, and that there were more mines than is consistent with the most efficient use of equipment, and that their aggregate capacity exceeded the country's demand.

The mining of coal does not constitute interstate commerce,
295 neither is the hauling of coal or other company material for its own use common carriage by railroad within the purview of the act.

The question of mine labor necessarily takes into account differences in circumstances arising before the service of the carrier begins, and I am unable to follow the majority that we can take those facts into consideration in determining whether undue preference or undue prejudice exists under section 3. We have the undoubted right, under the interstate commerce act, to control the facilities of the carriers so as to avoid unjust discrimination or undue prejudice as between shippers or receivers of property. We can not, however, regulate the coal industry except as it is incidentally affected by a proper regulation of car supply as a matter of transportation. The railroad-owned mine or the total-output con-

tract mine are operated continuously the greater part of the time whether there is a car surplus or a car shortage. Other mines operate only when they have orders for coal, and in many instances only in periods of peak demand and high prices. It is only natural, therefore, that mines operating practically full time can command the better class of mine labor. It seems to me that if, during periods of car shortage, we were to undertake to regulate the car supply so as to result in equal working time for all mines, we would be going far afield in the regulation of transportation with which we have to deal.

The finding of the majority, as I interpret it, predicates the finding of unreasonable, unjust discrimination, and undue prejudice chiefly on the ground of the effect which the unequal distribution of cars has on mine labor.

In a series of decisions under Docket 12986, Construction and Repair of Railway Equipment, we considered the practice of the carriers in using outside shops in repair and construction work, and found that they made unreasonable and uneconomical expenditures. We censured the carriers for exercising their best judgment in having repairs made at a time when such repairs were necessary at
296 outside shops instead of resorting to their own shops. The majority opinion in this case, it seems to me, is just the reverse of what the commission found in the case cited. Take the Chesapeake & Ohio as an example. It owns three mines, and employees in those mines are on the Chesapeake & Ohio pay roll, the same as any employees which operate the railroad. We, in effect, are saying to the Chesapeake & Ohio, that "although you can mine your coal cheaper in your own mines than you can secure it from elsewhere during periods of car shortage, nevertheless, you must not place cars at your own mines in excess of the pro rata share, and you must secure your other coal elsewhere at whatever price it is necessary for you to pay therefor."

On page 719 the majority report refers to certain further evidence introduced by opponents of the assigned-car rule on further hearing. The summation of the evidence referred to, which was in the nature of an exhibit filed, shows that had there been a pro rata distribution of all cars in the eastern and central regions of the Pennsylvania Railroad the supply to commercial mines for the eight months ended April 30, 1923, would have increased from 34.25 per cent to 54.02 per cent of the commercial cars ordered, or an increase of 57.81 per cent over the supply received by the commercial mines during that period. I think this is an erroneous conclusion to draw from the evidence. The exhibit in question shows, for example, that there were available for the month of September, 1922, more than 17,000 assigned cars in excess of requirements.

It is well known that we were in the throes of a coal strike from the first of April until well along in August, and that the large majority of mines in the central region of the Pennsylvania Rail-

road were union mines, and therefore closed down during the period of the strike. Many of those mines are owned by private-car interests, and many of the assigned cars available were doubtless private cars being held at the mines of the owners for the resumption of mining operations.

The central region of the Pennsylvania also supplies a large
297 quantity of railway fuel not only for the Pennsylvania Railroad but for other carriers. If the assigned cars had been prohibited at that time, as the majority report now would prohibit them, the private cars, as well as many of the fuel cars, would not have been in that particular region at that time. To say, therefore, that the percentage of cars at commercial mines would have been increased to the extent indicated, is fallacious. The private cars could not be placed by the carrier at mines other than as directed by the owner of such cars. If those cars were eliminated and the railway-fuel cars prorated in the district or division in which they were on the particular dates covered by the exhibit, it may be well that the carrier would then have been guilty of unjust discrimination in the supply of cars as between divisions or districts, which it would have been necessary for it to have equalized later.

Private Cars

Prior to our decision in the Hocking Valley case the carriers generally followed the practice of not counting private cars in the distribution of cars to coal mines. The mines were given all the private cars assigned or consigned to them and, in addition, their pro rata share of the available carrier equipment. In the Hocking Valley case we held that the private cars should be counted and considered in the distribution of equipment; that the owners or receivers of such private cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars was less than their pro rata share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

In United States v. Baltimore & Ohio R. R. Co., 154 Fed. 108, the Circuit Court of the United States for the District of Maryland had before it practically the same issue as before us in the Hocking Valley case. In that case a petition for mandamus was filed to require the Baltimore & Ohio Railroad to cease from subjecting the relator and other coal companies on the Monongah division to
298 undue and unreasonable discrimination in the shipping and transportation of coal. It was a practice of the respondent at that time to place private cars at the mines without taking those cars into account in arriving at the pro rata distribution to which the mine was entitled. In other words, the mine was given all the private cars assigned or consigned to it and, in addition, its pro rata share of system cars. The court, in substance, found as we had previously found in the Hocking Valley case, that the owners of indi-

vidual cars or those entitled to them by contract were not to be deprived of the exclusive use of such individual cars, but that such cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars. At page 114 the court said:

"It would not be reasonable to hold that the exclusive use of individual cars by the mine operators under a system which has grown up during half a century and under which the trade has erroneously developed, and upon the faith of which mine operators have invested millions of capital, often at times when the railroad company had neither money nor credit with which to increase its equipment, is now to be denied unless it could be done upon fair terms mutually acceptable to the mine operators and the railroad. The use of individual coal cars is not peculiar to the Baltimore & Ohio Railroad, but has been quite generally used from the beginning of the coal trade in the United States and in England. While it is true that if the railroad was so disposed it might, by not keeping up its coal-car equipment, gradually force all mine operators to provide individual coal cars, which would in the end leave in the business only those operators who were able to obtain and profitably use the large capital required to purchase individual cars, it does not appear that the railroad has pursued that policy. On the contrary, in 1905 it ordered 5,000 new coal cars of large capacity, increasing its total coal-
299 car equipment to about 45,000, and also increased its engine equipment so that it is abundant. Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary, it is only just. But, under the actual circumstances of the business of the coal trade on the Baltimore & Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a large number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad's equipment without reference to their own cars.

"Under the provisions of the interstate commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever. The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If, for

convenience or of necessity, the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road. These regularly run individual cars occupy the tracks and sidings. They are drawn by the locomotives and are operated by the employees of the railroad company, and must lessen the facilities in that respect of the independent operators. Indeed, an objection of the railroad company to individual ownership of cars is that they require special switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers, running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made all this regular equipment then available should be taken into the calculation, and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars, and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate commerce act. The mine operator would in any state of the car supply continue to get the exclusive use of his individual cars as before, but when the supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region."

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This case came before the United States Circuit Court of Appeals for the Fourth District on writ of error upon the judgment of the lower court by both the petitioner and respondents. In U. S. v. Baltimore & Ohio R. R. Co., 165 Fed. 113, the court affirmed the decision of the lower court on the question of private cars. The case reached the Supreme Court of the United States upon error prosecuted by the Baltimore & Ohio Railroad and the Fairmont coal companies, and in Baltimore & Ohio v. Pitcairn Coal Co., 215 U. S. 481, the Supreme Court reversed the decision of the lower court in all particulars on the ground that the court was without jurisdiction to pass upon the matters involved until after the commission had been properly afforded an opportunity to exercise its administrative functions. In the majority report reference is made to a statement of the general principles which should be applied, as found in the decision of the Circuit Court of Appeals in the case cited, and an extract from that decision appearing on page 122 is quoted. The principles there set forth are in entire accord with what the commission has always held should govern. In fact, the private-car owners are seeking no different principles

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in this proceeding. They are contending for the right to have the exclusive use of their private cars, even though during periods of car shortage the private cars so placed at a mine may exceed the pro rata share to which that mine would be entitled if dependent solely upon system cars. They are seeking this right only in the event that there is a shortage of cars unaccompanied by a shortage of locomotives, track facilities, congestion, or any cause which would tend to interfere with normal operation of the carriers. In the event that by the placement of private cars in excess of the pro rata distribution an undue proportion of the general facilities of the carrier are accorded to the private-car owners and thus denied to users of system cars, the private-car owners are willing to share the disability with all other shippers.

Under the majority decision, however, under a situation such as this the private-car owner would be denied the right to have its cars placed in excess of the pro rata distribution and the cars over and above such pro rata distribution would remain idle, this during a period when there was a general clamoring for coal, with the resultant high prices. The majority report also refers to and quotes at length from the decision of the commission in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C., 86, at page 92. In that
302 case the commission adhered to what it had previously found in the Hocking Valley case, and the paragraph quoted is in entire accord with what the private-car owners are here seeking.

In its report to the Congress on discriminations and monopolies in coal and oil, made in 1907, the commission expressly recommended that—

After reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private cars" for the handling of coal traffic; and, further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars, until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time.

Congress did not take the affirmative action recommended, although the commission in many of its annual reports to the Congress embodied recommendations of like effect.

In Ruttle v. Pere Marquette R. R. Co., 13 I. C. C. 179, the commission, in dealing with the private-car situation, said:

"But while the right to use private cars may doubtless be denied to shippers by appropriate legislation, we are not prepared, in the absence of a specific enactment to that effect, to say that their use is in itself unlawful. Whether under a given set of circumstances their use results in an unlawful advantage to their owners and in an unlawful disadvantage to others is another question, which under existing legislation is clearly under the control of the commission and may be made the basis of such relief as the facts in any particular case may justify."

Private cars have been in operation in this country over half
303 a century. The record shows that the Westmoreland Coal Company has been operating private cars for more than 60 years and the Berwind-White Company for more than 35 years. Under the system of private ownership of coal cars the trade has enormously developed, and, dependent upon its continuance, these mine operators and others have invested millions of capital, often at times when the railroads had neither money nor credit upon which to increase their equipment.

Under the circumstances it seems clear that it would not be reasonable to hold that the exclusive use of such private cars should be denied, in times of car storage, even though the private cars so placed at the mine are in excess of the pro rata share of cars currently accorded mines dependent upon system cars. The use of the private car during car-shortage periods increases the supply of system cars available to the operators dependent upon them and is a real benefit.

This naturally leads to the question, what is the material complaint against the use of the private car? Here again the answer is, as in the railroad-owned or total-output contract mine, the labor supply, but as heretofore pointed out, this is a matter which precedes any transportation service which a carrier is called upon to perform, and is not a matter upon which we could predicate a finding of unjust discrimination or undue prejudice. Orders under section 3 are usually in the alternative and give the carrier the option of removing the undue prejudice in one way or another. In the event that the order were made in the alternative in this case, by what means could the carrier comply with our order? It certainly has no control over the mines. It could not direct that the labor supply at certain mines be transferred to other mines so as to enable those mines to operate equal time. The element of taking mine labor into consideration in determining whether or not discrimination or undue prejudice exists under the interstate commerce act is entirely too remote and speculative to be given any consideration whatsoever.

As above pointed out, the private-car owners are not here
304 seeking any advantage over the mine owners dependent upon system cars in the use of any of the general facilities of the carriers.

Is there anything unreasonable in the practice of according to private-car owners a greater proportion of the carrier's facilities than that accorded operators dependent upon system cars when in so doing it is not to deny the operators dependent upon system cars reasonable service? Or, stated differently, if the carrier moves all traffic offered it by the operators both in private and system cars, and it so happens that there is a shortage of system cars, and that the private cars predominate in number, would it be unreasonable to transport all the private cars and system cars, or should the private cars moved not exceed the percentage of system cars placed

at the mines and offered for transportation, the balance of the private cars to remain idle? To state the proposition is to answer it.

The act contemplates the furnishing of service and of the facilities by the owner or the shipper of freight. Section 15, paragraph (13).

The Congress has thus recognized the use of the privately owned cars and has limited our power to touch that right to our power over the carriers. We can not declare that right unreasonable or unjustly discriminatory, or unduly prejudicial or unlawful because of something that is inherent in the nature of that right, because by so doing we would be abrogating a right which the Congress has recognized and which we have stated could only be abrogated by appropriate legislation. If in the exercise of that right preference is accorded to the private-car owners in the use of the carrier's general facilities another question is present. A perusal of our decisions in this question, as well as those of the courts, will show them to be in full accord with this reasoning. There has been no change in the law since those decisions which would warrant us in now holding otherwise.

Upon the further hearing much new evidence was submitted to support the claim of the necessity for the use of private cars by some of our most vital industries.

305 The private-car owners can be grouped generally into three classes:

(1) Those that own the plants, the mines, and the cars, the latter being used to transport coal from the owned mines to the plants of the owning company. In this class are included the Bethlehem Steel Corporation, the United States Steel Corporation and its subsidiaries, Pittsburgh Plate Glass Company, Youngstown Sheet & Tube Company, Wisconsin Steel and International Harvester Companies, Ford Motor Company, and the Steel Company of Canada.

(2) Those that own the cars and the plants, but not the mines, and which have long-term contracts with specified mines for the entire output of such mines. Included in this class are the by-product coke ovens not connected with the steel and other plants enumerated in class (1), and the Public Service Electric Company.

(3) Those that own the cars and the mines, but which are dependent upon outside contracts for the disposition of the coal. In this class may be included the Berwind-White Coal Company and the Westmoreland Coal Company.

The necessity of each class for a regular supply of suitable coal was explained at great length by high officials of corporations represented by each of these groups. Time and space will not permit an elaborate discussion of the vast amount of the very illuminating facts presented by each. I will therefore content myself to briefly point out some of the essential facts which show conclusively the absolute necessity for the steel and by-product coke corporations to secure a regular and adequate supply of suitable coal, which the past has demonstrated can not be secured alone in system cars during periods of car shortage.

The Bethlehem Steel Corporation at the time of the hearing operated over 2,000 by-product coke ovens, which are located at its different plants. These plants produce nearly every class of finished product, including rails, frogs, switches, railroad cars, structural steel, and ordinance material. These products require the finest grades of steel, particularly with reference to phosphorous and sulphur content. As the use of steel making continues to develop, the necessity for selecting special coals will increase. One of the greatest economic developments in the steel industry during the past 20 years has been the utilization of by-products of coking coal. These by-products can only be utilized at the works, because at the coal mines there are no uses for the gas and other by-products. The character of its coking qualities and its physical characteristics have to be considered with great care to make the coke from the by-product ovens suitable for immediate use in the blast furnaces. It is necessary, therefore, to select the coal mines which produce suitable coal, and even at best the coal from suitable mines must usually be mixed with coal from other mines to get the desired results. Coke of an inferior quality manifests itself mischievously in a blast furnace on account of what is termed "structure." Not all low-volatile coal offered can be used, because to be suitable it must be of a certain chemical composition and possessing a property commonly called "caking." For the steel industry coke in large lumps is necessary, the size being important on account of the service being required in the furnace, thus narrowing the field from which coal for this purpose can be secured. This property of the coal which results in "caking" is lost by storage. A daily tonnage of coke is required, as blast furnaces are designed and built for continuous operation. Interference with this operation means many ills to the furnaces and their subsequent operation.

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This corporation owns 31 coal mines, with an approximate present capacity of 9,500,000 tons per annum. These mines were most carefully selected for the metallurgical and coking qualities of their coal. Of the coal available to it only 15 or 20 per cent is suitable for coking purposes. Over 300 coal properties were tested with a view to purchasing, and only 5 per cent of them contained coal meeting the physical and chemical requirements to produce coke for steel making. After the selection and purchase of these specific mines it proved impossible, in times of car shortage, to move enough coal from them to the plants to keep the plants in operation. Partial shutdowns with attendant unemployment followed. The result was the purchase of 3,975 private coal cars, which are used solely in transporting coal from the mines to its own plants for its own consumption. No system cars are used at the mines using private cars.

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A by-product coking plant is usually made up of one or more blocks or batteries of ovens. All batteries in one plant are of uniform height. Each oven has a system of flues in which gas is burned

and the oven is heated through a silica wall from 4 to 6 inches in thickness. The ovens are built of silica brick. It is necessary to heat the oven very gradually as the brick has a very high factor of expansion. One battery of ovens will expand as much as four feet. The expansion joints in the brick work are between every two ovens, which makes it necessary to heat these two ovens carefully and gradually. It takes from six to eight weeks to heat a plant before it can be put in operation. If shut down suddenly it would wreck the brick work and cost from $300,000 to $500,000 for replacement. If the battery has to be cooled off it is put out of operation for from two to three months. The brick required for these ovens are in specially molded shapes and are not carried in stock, and take four months to make. The essential elements for the successful operation of a by-product coking plant are a continued operation, with a continuous and regular supply of high-grade coal of uniform quality. A continuous operation is necessary because the by-product plants are under contract to furnish daily a fixed amount of gas to the gas companies, which, in turn under their franchises, furnish gas to numerous municipalities, and generally speaking, have no facilities of their own for producing gas. A regular supply of a particular kind of coal is necessary to secure the volume of gas
308 required. The quantity, quality, and B. t. u. content of the gas so furnished must be constant, and must also meet trade requirements.

Not all coal is good gas burning or coke running, due to the volatile content. A sudden change from one coal to another would cause trouble. As indicating the importance of the constant supply of suitable coal, one of the large by-product plants maintains a test plant to determine the kind of coke which can be made from the different grades of coal. Before contracting for coal from 500 to 1,000 tons of coal are run through the plant and the cokes thus produced are furnished to the trade for the purpose of determining whether that particular coke will meet requirements. Coke produced at such by-product plants must be of uniform grade, low in sulphur, and uniform in structure, as it competes with that received from the beehive coke ovens located at or adjacent to the mines, which always secure a uniform supply of coal. Beehive ovens are crude, simple, and inexpensive; can be started up or shut down without serious injury, and are located close to the mine. They receive their coal continuously from the same mine and therefore produce a uniform product. They are therefore not subject to the transportation difficulties encountered by the by-product ovens. Coke made in by-product ovens is to a large extent supplied to plants operating water-gas machines. This coke must be low in ash, that does not fuse at low temperature. Otherwise the machines will become clinkered and the capacity will be reduced 50 per cent. If the coke is bad the gas company's capacity is cut down and the public is not supplied. The by-product coke industry is vital to

the private individual or the householder because it helps to cheapen domestic gas, which supplies a high-grade domestic fuel that is cheaper than anthracite. It supplies sulphate ammonia which is the best raw material for fertilizer for the farmer, and has increased the output of this fertilizer material over 100 per cent. In 1900 a little over 1,000,000 tons of by-product coke were produced, whereas in 1920 the output was over 28,000,000 tons. Over $200,000,-
309 000 has been invested in the last 10 years in by-product coke plants and their accessories. They are built throughout the country to augment the natural gas which is giving out in various districts. Its use is being extended very rapidly. The basis for the future chemical industry is dependent upon it. The dye industry in this country has grown enormously as a result of the by-product coke operations. The by-product coke industry of this country has made enormous strides in the last few years. The record shows that for every ton of coal coked in a by-product oven there is saved approximately, varying with the kind of coal used, 25 pounds of sulphate of ammonia, 6,000 feet of gas, 10 gallons of tar, and 3 gallons of motor fuel.

The by-product coke operators generally have had unsatisfactory experience in keeping their plants in operation with the kind of coal necessary, particularly during periods of car shortage. To protect against such shortage these private corporations have purchased coal cars and have invested therein several millions of dollars.

The aggressive and destructive attack which the majority report is upon the by-product coking industry, retarding advance in the art of steel making and utilization of coal-tar products, is timely for the Nation's rivals. The producers of Germany, and other European countries, are consolidating their position to take control of world markets, including our own, and to meet our growing rivalry. The phenomenal development of the coal-tar industry in this country since the beginning of the World War has been well said to be "one of the romances of American business, and world business as well." The American dye industry is an illustration, but dyes are only one of many coal-tar products. Others include roofing and road material, fertilizers, ammonia, benzol, motor benzol, toluol, naphtha, benzine, toluene, naphthalene, photographic materials, medicines, perfumes, flavors, and articles too numerous to mention.

The majority report gives this industry the most serious
310 and alarming setback it has ever had. It is the greatest benefit that could be conferred upon our foreign competitors in science and industry. The one thing above all others they would have us do is to abolish the use of the private car. I can see no justification or excuse for the damage done. The private car without adding a penny to the general burden, increases transportation facilities generally available. Its owners provide for themselves additional cars without which they would be entitled to share in the distribution of all other equipment. It is undeniable that those

who oppose their use are benefited by them. To bar them serves only to foster private greed and envy at the expense of public welfare.

I have not attempted to deal exhaustively with the mass of unanswerable testimony placed before us upon further hearing which, seemingly, the majority report utterly ignores. Witnesses Rust, Berwind, Schwab, and other leaders in the industrial arts have made a showing which should have enlightened us. I am unable to comprehend why they failed. They have conclusively demonstrated that the private car is essential to the economical and efficient bunkering of ships and to the carrying on of many of the most important industries in the country. No attempt to answer their testimony was made, and no answer is possible. Some of the most important achievements within the Nation's reach are dependent upon the use of the private car. On questions regarding industries so highly technical and scientific as the making of steel, and many other products, we should accept as basic facts the conclusions of specialists. We have such conclusions by the most eminent authorities in the country. By disregarding them and setting up our own impressions, we incur the censure that arbitrary action, without support in law or fact, denying justice, should bring upon us.

Cox, Commissioner, dissenting:

For reasons already set forth in my former dissenting expression in this case, 80 I. C. C. 520, at page 587, and from consideration
311 of the additional testimony furnished at the further hearing, I am unable to concur in the findings of the majority.

This question is generally recognized as of vital importance, and perhaps no question which has come before the commission in recent years is more closely related to the industrial life of the Nation than this case which deals with the distribution of coal cars. Public utilities, transportation agencies, and other industries which are not only intimately associated with the distribution of heat, light, and power, but with practically all the necessaries of life as well, are all dependent upon a regular and dependable fuel supply. The present efficiency in transportation is largely dependent upon an unfailing supply of coal. If this supply is reduced, or even restricted, the industrial life of the country is at once affected and the public welfare suffers accordingly. President Coolidge has emphasized the need for the elimination of waste and there is splendid opportunity for cooperation along these lines in the production and distribution of coal. Our position in connection with the competitive markets of the world also emphasizes the need for such cooperation. It is my thought that the use of the assigned car as well as private cars is along the line of efficiency and economy of operation. They both occupy an important place in the field of efficient transportation and their use should be encouraged rather than condemned.

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23d day of December, A. D. 1924.

No. 12530

In re Distribution among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

It appearing, That by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rules and regulations as might appear to be necessary;

312

It further appearing, That by order entered June 13, 1923, the commission entered its order requiring the respondents to change their practices with regard to the distribution of privately owned coal cars and cars placed for railway fuel coal so as to comply with the findings of the commission embodied in its report, filed herein, 80 I. C. C. 529;

It further appearing, That by order entered on October 5, 1923, the commission reopened the case for further hearing, and pending its report on said further hearing, the effective date of said order entered on June 13, 1923, has been postponed until January 15, 1925;

And it further appearing, That said further hearing has been had, and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the order entered in this proceeding on June 13, 1923, be, and the same is hereby, further modified so as to become effective on March 1, 1925, instead of on said January 15, 1925.

It is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. McGINTY,
Secretary.

313-492 [Omitted in printing.]

493–494 In United States District Court

No. 3271

[Title omitted.]

Answer of the United States

Filed April 3, 1925

United States of America for answer to the bill of complaint filed herein against it says:

I. On information and belief, defendant admits the facts alleged in Paragraph I in manner and form as alleged.

II, III, IV, V. Defendant has no knowledge of the matters and things alleged in Paragraphs II, III, IV, and V; it neither admits nor denies the same; and in so far as they may become material upon the hearing, it will require strict proof thereof.

VI. On information and belief, defendant admits the facts alleged in Paragraph VI in manner and form as alleged.

VII. Defendant has no knowledge of the matters and things alleged in Paragraph VII; it neither admits nor denies the same; and in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits, subject to verification, that the commission made and published the three reports which are identified by the titles thereof.

495 VIII. On information and belief, defendant admits the facts alleged in Paragraph VIII in manner and form as alleged. Defendant alleges that the complainants were accorded the full hearing provided by statute.

IX. On information and belief, defendant admits the facts alleged in Paragraph IX in manner and form as alleged, with this exception: Defendant denies that the effect of the order of June 13, 1923, as modified by the order of December 23, 1924, is as averred.

X, XI, XII. Defendant has no knowledge of the matters and things alleged in Paragraphs X, XI, and XII; it neither admits nor denies the same; and in so far as they may become material upon the hearing, it will require strict proof thereof.

XIII. Defendant has no knowledge of the matters and things alleged in Paragraph XIII; it neither admits nor denies the same; and in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits, subject to verification, that the commission made and published the two reports which are identified by the titles thereof.

XIV. Defendant has no knowledge of the facts alleged in Paragraph XIV in manner and form as alleged; it neither admits nor denies the same; and in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits, subject to verification, that the commission

made and published the report which is identified by the title thereof.

XV. On information and belief, defendant admits the facts alleged in Paragraph XV in manner and form as alleged, with these exceptions: Specifically, defendant denies the allegations that (a) "the evidence relative to privately owned cars of record
496 before the commission in this investigation is vague, meagre, and inconclusive; has reference to only a few isolated instances of the alleged abuse of such private-car operation on a small number of railroads, and does not support the finding of undue or unreasonable priority, preference, or discrimination in the use, enjoyment, and operation of privately owned coal cars"; and (b) "the orders are unreasonable and unwarranted attempts by the commission to regulate labor conditions at the mines of your complainants and to regulate their operation and distribution of coal; and, while in form seeking to avoid the possibility of such discrimination, in substance and effect abolish privately owned coal cars and deprive their owners of their property rights therein."

XVI. Defendant has no knowledge of the matters and things alleged in Paragraph XVI, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

XVII. Defendant denies the matters and things alleged in Paragraph XVII and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XVIII. Defendant denies the matters and things alleged in Paragraph XVIII and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

Further answering, defendant alleges that the matters and things set forth in the bill of complaint and sought to be put in issue before the court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions
497 of the interstate commerce act; in its reports in writing with respect thereto, made after full hearing and on due notice to all of the parties, which state its conclusions, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the commission of which the parties were advised.

Defendant alleges that the facts set forth in the reports of the commission and each and all of the same are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the bill of complaint, or any part of the same, which are inconsistent with any fact or facts found by the commission.

(b) Any and all inferences of fact from any particular fact or facts alleged in the bill of complaint, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the commission.

(c) Any fact or facts alleged in the bill of complaint, or any part of the same, which deny, or which seek to deny, any fact or facts found by the commission.

(d) Any fact or facts alleged in the bill of complaint, or any part of the same, which set up, or which seek to set up, matters and things which were not before the commission.

(e) Any fact or facts alleged in the bill of complaint, or any part of the same, which attack or which seek to attack the action of the commission, and to show facts other than what the commission has found and declared.

(f) Any allegations in the bill of complaint, or any part of the same, which allege that facts were found by the commission in its reports and orders which, as shown on the face thereof, were
498 not so found.

(g) Any conclusions of law alleged and insisted upon in the bill of complaint, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

(h) Each and every allegation in the bill of complaint contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the bill of complaint be dismissed at the cost of complainants and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
GEORGE W. COLES,
United States Attorney.

499 [*Duly sworn to by Blackburn Esterline; jurat omitted in printing.*]

500 **In United States District Court**

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Apr. 3, 1925

To the honorable the judges of said court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

P. J. FARRELL,
R. GRANVILLE CURRY.

501–502

In United States District Court

[Title omitted.]

No. 3271

Answer of Interstate Commerce Commission

Filed Apr. 3, 1925

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

503 Answering Paragraphs I to VI, inclusive, of the bill of complaint, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

II

Answering Paragraphs VII to XVIII, inclusive, of the bill of complaint, the commission admits and alleges that by an order dated March 22, 1921, which order is referred to in Paragraph VIII and made a part of the bill of complaint as Exhibit D, the commission instituted a proceeding and an investigation on its own motion into and concerning the reasonableness and propriety of car distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act, including the carriers referred to in said Paragraph VIII, were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further admits and alleges that it made and entered and served upon all the respondents in said proceeding the report and order of June 13, 1923, which is referred to in
504 said Paragraph IX and made a part of the bill of complaint as Exhibit E.

The commission further admits that, as alleged in said Paragraph IX, complainants herein and others petitioned the commission for a rehearing and for a postponement of the effective date of said order of June 13, 1923; that by supplemental orders the effective date of said order was extended from time to time; that meanwhile said proceeding was reopened for further hearing by the order of October 9, 1923, referred to in said paragraph; that further hearings were had; that complainants herein and other private car owners on such further hearing introduced additional testimony in support of the assigned car rule and again presented their position in briefs and upon oral argument; and that thereafter, on December 23, 1924, the commission rendered its supplemental report and order in said proceeding, which is referred to in said paragraph and made a part of the bill of complaint as Exhibit G.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testi-
505 mony and evidence submitted on behalf of complainants herein by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, including briefs and oral arguments in behalf of complainants herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding, said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, which included the commission's decisions, conclusions, orders, and requirements in the premises.

The commission further alleges that in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to
506 said proceedings, by their respective counsel, and all matters called to its attention by complainants herein.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or

entered by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said bill of complaint.

In particular the commission denies that irreparable injury or legal injury of any kind will result to complainants, or any of them, if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoyed and set aside as prayed for by complainants.

Except as herein expressly admitted, the commission denies the truth of each and all the allegations contained in said bill of complaint in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to
507 aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.

508–509 In United States District Court

No. 3271

[Title omitted.]

Petition of Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation, for leave to intervene

Filed May 21, 1925

To the honorable the judges of the United States District Court for the Eastern District of Pennsylvania, sitting in equity:

Come now the Pocahontas Operators' Association, the Empire Coal & Coke Company, and the Pocahontas Fuel Company, Incorporated, and respectfully represent that the petitioners, and each of them, have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and to become parties to said proceeding, and for grounds of the proposed intervention say:

The petitioner, Pocahontas Operators' Association is an
510 unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized, and doing business under the laws of the State of West Virginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia, said association being organized for the purpose of doing the work ordinarily done by trade associations in connection with preserving and promoting the general interests of its members.

The petitioner, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

The petitioner, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

All of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia.

The principal offices of the petitioners are as follows:

Pocahontas Operators' Association, Bluefield, W. Va.; Empire Coal & Coke Company, Landgraff, W. Va.; Pocahontas Fuel Company, Incorporated, Boissevain, Va.

Petitioners file this petition in their own behalf, and also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it
511 impracticable to bring them all before the court, and these petitioners file this petition on behalf of the whole.

Petitioners and those on whose behalf this petition is filed have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these petitioners. Petitioners are therefore interested in the general question to be determined in this case.

Pocahontas Operators' Association, on behalf of all of its members, including said other petitioners herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief, and presented oral argument before the commission against the contentions of the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and manner claimed to be their right in the
512 bill herein. These petitioners are therefore proper parties defendant in this suit.

Wherefore these petitioners pray:

(a) That leave be granted them to intervene and to be treated as parties defendant herein, and that leave be granted them to file an answer to the bill herein, with the right to have notice of and appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and be heard in person or by counsel upon brief and in oral argument.

(b) That this court order that due and proper service of this petition be forthwith made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice, as in the district court jurisdiction act provided, and by serving a copy hereof upon each of the complainants herein.

And your petitioners as in duty bound will ever pray, etc.

GREENER & GILLESPIE,
Solicitors for Petitioners.

E. L. GREENER,
Of Counsel.
J. F. BULLETT.
MAY, 1925.

513–515 [*Duly sworn to by Wm. C. Atwater et al.; jurat omitted in printing.*]

516 In United States District Court

No. 3271

[Title omitted.]

Amendment to answer

Filed May 26, 1925

For the purposes of this suit the counsel for the United States admits the allegations of fact contained in Paragraphs II, III, IV, and V of the bill of complaint with this exception: He does not ad-

mit the open top cars referred to are of the value alleged and only admits they are of substantial value.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission, concede that the railroad carriers, over whose lines the cars of complainants move, have been and are willing to handle them.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

517 In United States District Court

In equity, No. 3271

[Title omitted.]

Before the honorable Victor B. Wooley, United States circuit judge; the honorable J. Whitaker Thompson and the honorable W. H. Steward Thomson, United States district judges, sitting in the District Court pursuant to urgent deficiencies act (38 Stat. 219).

Final decree

Filed Dec. 15, 1925

This cause came to be heard at this term on petition, answers and evidence submitted, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the order of the Interstate Commerce Commission in the case entitled "Assigned Cars for Bituminous Coal Mines" (In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel), No. 12530, entered at a general session of the commission at its office in Washington, D. C., on June 13, 1923, as affirmed by its further order of December 23, 1924, be and the same is hereby set aside, annulled, and suspended.

2. That a permanent injunction be and the same is hereby granted and issued out of this court as prayed in the bill of complaint, and the defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be and they are hereby permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. WHITAKER THOMPSON,
W. H. S. THOMPSON,
United States District Judges.

518 In United States District Court

No. 3271

[Title omitted.]

Petition for appeal by United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court made and entered December fifteenth, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

519 In United States District Court

No. 3271

[Title omitted.]

Assignments of error of the United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December fifteenth, 1925.

The District Court erred:

I. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

II. In not dismissing the bill of complaint for want of equity.

III. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

IV. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

520 V. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft-coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

VI. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

VII. In holding "that the use of the railway-fuel cars and private cars under the assigned car rule is not per se preferential."

VIII. In holding "that there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

IX. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

X. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

XI. In holding that the "valuable legal right in the ownership of private cars * * * furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage."

XII. In holding that the compensation to the owners for the use by railroads of private cars has been fixed by the commission at one and one-half cents per mile.

XIII. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned-car mines will

521 result if the assigned car rule is abolished.

XIV. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

XV. In holding that "the right to the use of private cars" is not subordinate to the power of Congress and of the commission to regulate interstate commerce.

XVI. In failing to discriminate between the legal title of the complainants in and to the cars and the use of the cars in interstate commerce, over which the commission has full control.

XVII. In holding that the railroads can not reasonably secure an adequate supply of fuel under the order of the commission, and that therefore the present method of obtaining railroad fuel by the use of assigned cars is justified, although the general public is thus served at the expense of other shippers and consumers of coal.

XVIII. In holding that the commission in prescribing reasonable and nonpreferential rules of car distribution can not treat upon the same basis as the other coal cars which the carrier owns or uses, cars owned by private shippers and used by the carrier.

XIX. In ignoring the primary duty of the carriers under the interstate commerce act at all times to furnish transportation, including an adequate supply of cars.

XX. In not overruling the claim of coal shippers to the right in times of car shortage to the exclusive and preferential use of coal cars owned by them in possession of, operated, and otherwise treated by the several carriers as a part of their general operation and equipment.

XXI. In holding that rentals paid by carriers to the owners of private coal cars must be considered in determining rules by which carriers are to be governed in distributing coal cars.

XXII. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15) of section 1 of the interstate commerce act.

322 XXIII. In holding that the commission "has misconceived the purpose of paragraph (15) of section 1" of the interstate commerce act.

XXIV. (Error assigned by the United States only.) In failing to give full force and effect to paragraph (12) of section 1 of the interstate commerce act, and in holding "We find it, however, unnecessary to base our conclusions in the case upon the construction of paragraph (12) of section 1, although its legislative history in connection with the administrative history of the assigned-car rule has a bearing upon the question of the reasonableness of the order of the commission which is before us."

Wherefore defendants, and each of them, pray that the final order or decree of the District Court, entered December fifteenth, 1925, be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

GEORGE W. COLES,
United States Attorney Eastern District of Pennsylvania.
BLACKBURN ESTERLINE
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

523 **In United States District Court**

No. 3271

[Title omitted.]

Order allowing appeal of United States and Interstate Commerce Commission

Filed Feb. 8, 1926

In the above-entitled cause, United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December fifteenth, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which the said order or decree was made and entered to the Supreme Court of the United States.

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

524 **In United States District Court**

No. 3271

[Title omitted.]

Precipe for transcript of record

Filed Feb. 16, 1926

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill of complaint.
2. Exhibits to the bill of complaint.

3. Answer of the United States.

4. Intervention of Interstate Commerce Commission and its counsel.

5. Answer of Interstate Commerce Commission.

6. Intervening petition of the Central Pennsylvania Coal Producers' Association.

7. Intervening petition of Pocahontas Operators' Association et al.

8. Answer of Pocahontas Operators' Association et al.

9. The following certified copies of reports and orders of the commission, viz:

Exhibit No. 15, No. 13896, In re Rules Governing Ratings of Coal Mines, etc., December 23, 1924, 95 I. C. C. 309, 384, report.

Exhibit No. 14, No. 12530, Assigned Cars for Bituminous Coal Mines, December 23, 1924, 93 I. C. C. 701, 754, report and order.

525 Exhibit No. 13, No. 12530, Assigned Cars for Bituminous Coal Mines, June 13, 1923, 80 I. C. C. 530, 589, report and order.

Exhibit No. 12, In re Assignment of Freight Cars, June 11, 1920, 57 I. C. C. 760–772, report and order.

Exhibit No. 11, No. 4906, In re Private Cars, July 31, 1918, 50 I. C. C. 652–718, report and order.

Exhibit No. 10, No. 9284, Car Supply Investigation, January 18, 1917, 42 I. C. C. 657, 706, report and order.

Exhibit No. 9, No. 1383, Hillsdale Coal & Coke Co. v. Pennsylvania Railroad, March 7, 1910, 19 I. C. C. 356, report and order.

Exhibit No. 8, No. 1322, Rail & River Coal Co. v. Baltimore & Ohio, June 2, 1908, 14 I. C. C. 86, 87–97, report and order.

Exhibit No. 7, No. 1305, No. 1306, No. 1307, Royal Coal & Coke Co. v. Southern Railway Co., April 13, 1908, 13 I. C. C. 440, 441, 450, report and order.

Exhibit No. 6, No. 1294, 1295, 1317, Traer v. Chicago & Alton (2 other cases), April 13, 1908, 13 I. C. C. 451, 459, report and order.

Exhibit No. 5, No. 1033, Ruttle v. Pere Marquette, March 2, 1908, 13 I. C. C. 179, 186, report.

Exhibit No. 4, No. 1008, Railroad Commission of Ohio v. Hocking Valley, July 11, 1907, 12 I. C. C. 466, 480, report.

Exhibit No. 3, orders in No. 12530 of date, respectively, July 25, 1923, September 12, 1923, October 9, 1923, November 6, 1923, December 14, 1923, December 19, 1923, March 3, 1924, May 6, 1924, June 30, 1924, October 22, 1924, December 9, 1924 (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

Exhibit No. 2, which consists of (a) order in No. 12530, March 22, 1921, one mimeograph page; (b) order in No. 13896, June 17, 1922, one page with 6 pages of rules attached (Exhibit A, 5½ pages, and Exhibit B, ½ page) (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

10. Exhibit No. 1, certified copy of the transcript of the record of the evidence and proceedings before the Interstate Commerce Commission offered by the counsel for the petitioners (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

11. Certified copies of the following annual reports of the commission (or in lieu thereof any narrative agreed upon by the parties and or approved by the court):

526 Exhibit No. 16, 21st, 1907; December 25, 1907.
Exhibit No. 17, 34th, 1920; December 1, 1920.
Exhibit No. 16, 35th, 1921; December 1, 1921.
Exhibit No. 19, 36th, 1922; December 1, 1922.
Exhibit No. 20, 37th, 1923; December 1, 1923.
Exhibit No. 21, 38th, 1924; December 1, 1924.

12. Stipulation of counsel for the United States that certain allegations contained in the bill of complaint are true.
13. Order of final submission.
14. Opinion of the District Court.
15. Final decree.
16. All journal entries in their appropriate order.
17. Petition for appeal.
18. Assignment of errors.
19. Order allowing appeal.
20. Praecipe for record.
21. Summons and severance (two).
22. Notice to the attorney general of Pennsylvania.
23. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

Service of the foregoing praecipe for record and the receipt of a copy thereof are hereby admitted and acknowledged this 15th day of February, 1925.

JOHN HAMPTON BARNES,
Solicitor for Appellees.

327 In United States District Court

No. 3271

[Title omitted.]

Summons and severance

Filed Feb. 19, 1926

To the Central Pennsylvania Coal Producers' Association, a voluntary unincorporated association:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are an intervener.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this ——— day of February, 1926.

A. W. LIVERRIGHT,
Solicitor for the Central Pennsylvania Coal Producers' Association.

328 In United States District Court

No. 3271

[Title omitted.]

Summons and severance

Filed Feb. 10, 1926

To Pocahontas Operators' Association, an unincorporated voluntary association; Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation:

You are hereby invited to join with the United States of America and Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are interveners.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 8th day of February, 1926.

E. S. GREVER,
Solicitor for the foregoing Intervenors.

529 In United States District Court

No. 3271

[Title omitted.]

Notice of appeal

Filed Feb. 9, 1926

To the Honorable GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

You are hereby notified that the defendants, United States of America and Interstate Commerce Commission, have taken an appeal from the final order or decree of the District Court, entered December 15, 1925, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of February, 1926.

GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

530 [Citation in usual form, showing service on John H. Barnes, filed Feb. 13, 1926, omitted in printing.]

531 [Clerk's certificate to foregoing transcript omitted in printing.]

532–536 In United States District Court

Statement re opinion

[For the opinion of the court filed November 25, 1925, see record in the case of United States of America, defendant and Interstate Commerce Commission, intervening defendant, vs. The Akron, Canton & Youngstown Railway Company et al.]

537 Transcript of Record. In the Supreme Court of the United States. October term, 1926.

No.———

The United States of America and Interstate Commerce Commission, appellants, vs. Bethlehem Steel Company, Bethlehem Mines Corporation, Bethlehem Steel Corporation, appellees, and

Illinois Steel Company,
Carnegie Steel Company,
American Steel & Wire Company,
National Tube Company,
American Sheet and Tin Plate Company,
United States Coal and Coke Company,
United States Fuel Company,
H. C. Frick Coke Company,
United States Steel Corporation,
The Steel Company of Canada, Ltd.,
The Cleveland-Cliffs Iron Company,
Perry Iron Company,
The Youngstown Sheet and Tube Company, Intervenors.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

538 In United States District Court, Eastern District of Pennsylvania. 3273. December term, 1924

Bethlehem Steel Company, Bethlehem Mines Corporation, Bethlehem Steel Corporation, plaintiffs (Frederic L. Ballard, Esq.), and Illinois Steel Company, Carnegie Steel Company et al., the Steel Company of Canada, Ltd., the Youngstown Sheet & Tube Co., intervening plaintiffs (Charles S. Belsterling, Esq.), vs. United States of America, defendant (George W. Coles, Esq.), and Interstate Commerce Commission, Central Penna. Coal Producers Ass'n, Pocohontas Operators Association et al., intervening defendants (P. J. Farrell, Esq., R. Granville Curry, Esq., A. M. Liveright, Esq., Greever & Gillespie, Esqs.)

Docket entries

Feb. 27, 1925. Petition to annul, etc., order of Interstate Commerce Commission filed.
Mar. 10, 1925. Affidavit as to service of copy of petition filed.
Mar. 20, 1925. Intervening petition of Illinois Steel Company et al. filed.
Mar. 31, 1925. Affidavit as to service of petition filed.
Apr. 3, 1925. Appearance of P. J. Farrell, Esq., and R. Granville Curry for Interstate Commerce Commission filed.
Apr. 3, 1925. Answer of Interstate Commerce Commission filed.
Apr. 3, 1925. Answer of United States filed.
Apr. 4, 1925. Answer of Interstate Commerce Commission to petition of Illinois Steel Company et al. filed.
May 6, 1925. Intervening petition of the Steel Company of Canada, Ltd., et al. filed.
May 6, 1925. Intervening petition of the Youngstown Sheet & Tube Company filed.
539 May 19, 1925. Answer of Interstate Commerce Commission to petition of Steel Company of Canada, Ltd., et al. filed.
May 19, 1925. Answer of Interstate Commerce Commission to petition of Youngstown Sheet and Tube Co. filed.
May 20, 1925. Petition of Central Penna. Coal Producers Ass'n for leave to intervene filed.
May 21, 1925. Certificate as to mailing copies of petition filed.
May 21, 1925. Petition of Pocahontas Operators' Association et al. for leave to intervene filed.
May 25, 1925. Argued.
May 26, 1925. Hearing continued.
May 26, 1925. Stipulation of counsel admitting certain allegations filed.
May 26, 1925. Stipulation of counsel admitting certain allegations in petition of intervention of Illinois Steel Company et al. filed.
May 27, 1925. Hearing continued.
May 27, 1925. Stipulation of counsel admitting certain allegations in petition of intervention of Steel Company of Canada et al. filed.
May 27, 1925. Stipulation of counsel admitting certain allgations in petition of intervention of Youngstown Sheet and Tube Company filed.
May 28, 1925. Hearing continued.
May 29, 1925. Hearing continued.
Nov. 25, 1925. Opinion, Thompson, J., setting aside and annulling and suspending enforcement of order of Interstate Commerce Commission filed.
Dec. 15, 1925. Final decree filed.

Feb. 6, 1926. Assignments of error by United States and Interstate Commerce Commission filed.

Feb. 6, 1926. Petition for appeal by United States and Interstate Commerce Commission filed.

Feb. 8, 1926. Decree granting petition for appeal by United States and Interstate Commerce Commission filed.

340 Feb. 8, 1926. Assignment of errors by intervening defendants (Pocahontas Operators' Assn., Empire Coal & Coke Co., & Pocahontas Fuel Co., Inc.) filed.

Feb. 8, 1926. Petition for appeal by intervening defendants (Pocahontas Operators' Assn., Empire Coal & Coke Co. Pocahontas Fuel Co., Inc.) filed.

Feb. 9, 1926. Acceptance of service by Attorney General of Penna. of notice of appeal filed.

Feb. 9, 1926. Order of court granting prayer of petition for appeal of intervening defendants.

Feb. 9, 1926. Citation on behalf of intervening defendants exit.

Feb. 10, 1926. Summons and severance by defendants to interveningsdefendants filed.

Feb. 11, 1926. Notice of appeal by defendants and acknowledgment of service thereof filed.

Feb. 16, 1926. Citation by United States and Interstate Commerce Commission returned service accepted and filed.

Feb. 16, 1926. Praecipe as to transcript of record sur appeal filed.

Feb. 18, 1926. Summons and severance by defendants to the Central Pennsylvania Coal Producers Association and acknowledgment of service thereof filed.

Feb. 25, 1926. Citation by intervening defendants returned service accepted and filed.

Mar. 5, 1926. Cert. copy of decree extending time in which to complete appeal filed.

May 10, 1926. Certified copy of decree extending time to July 9, 1926, in which to file record sur appeal in Supreme Court filed.

July 7, 1926. Decree extending time in which to file record in Supreme Court filed.

Sept. 1, 1926. Cert. copy decree extending time in which to file record in Supreme Court filed.

Oct. 2, 1926. Certified copy of decree extending time in which to file record in U. S. Supreme Court filed.

Oct. 19, 1926. Stipulation of counsel as to transcript of testimony in narrative form filed.

Oct. 19, 1926. Narrative statement of testimony filed.

541-543 IN UNITED STATES DISTRICT COURT

No. 3273

Title omitted.

Petition filed Feb. 27, 1925

To the Honorable the Judges of the District Court:

I

Your petitioners, Bethlehem Steel Company, Bethlehem Mines Corporation and Bethlehem Steel Corporation, bring this their petition in equity against the United States of America for the purpose of enjoining, setting aside, anulling and suspending a certain order of the Interstate Commerce Commission (hereinafter called the commission), entered June 13, 1923, as amended by supplemental order of the commission entered December 23, 1924, and specified to become effective March 1, 1925, in a proceeding begun by the
544 commission on its own motion and designated as "Assigned cars for bituminous coal mines, No. 12539, in redistribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," insofar as said order relates and applies to the distribution among coal mines of privately owned cars, and in particular insofar as said order relates and applies to cars owned by petitioners or any of them and cars owned by others similarly situated;

In support thereof your petitioners allege and show

II

Bethlehem Steel Company is a corporation of the State of Pennsylvania and is engaged in the manufacture, sale and shipment of iron and steel products at plants operated by it at Bethlehem, Reading, Lebanon, Coatesville, Steelton and Johnstown, Pennsylvania; Sparrows Point, Maryland, and Lackawanna, New York. Its principal office is at Bethlehem, Northampton County, Pennsylvania.

III

Bethlehem Mines Corporation is a corporation of the State of Delaware, and is engaged in the production of bituminous coal at mines located at Heilwood, Wehrum, Ellsworth, Bentleyville, Mariana and Slickville, Pennsylvania, and Morgantown and Fairmont, West Virginia, for consumption by your petitioner, Bethlehem Steel Company. It is registered to do business in Pennsylvania with its principal operating office at Bethlehem, Northampton County, Pennsylvania.

IV

Bethlehem Steel Corporation is a corporation of the State of New Jersey and owns all the capital stock except directors shares,
545 of a number of subsidiary corporations including petitioners, Bethlehem Steel Company and Bethlehem Mines Corporation.

V

Your petitioners, so brought together through stock-ownership as aforesaid, form essential parts of a unified and integrated business for the production from raw materials of iron and steel products. The term "petitioners" as used herein refers to said Bethlehem Steel Company, Bethlehem Mines Corporation and Bethlehem Steel Corporation collectively, and, in view of the unity of interest of the petitioners, that term is used herein where the statement made may be true as to less than all of the petitioners considered as separate entities.

Petitioners own, maintain and furnish 3,975 open top freight cars (commonly known as coal cars) which are used in the transportation of coal from said mines to the plants and for the consumption of your petitioner, Bethlehem Steel Company, as hereinafter more fully set forth.

VI

The United States of America is made defendant in this suit pursuant to the commerce court act (36 Stat. L. 539) approved June 18, 1910, and the district court jurisdiction act being part of the urgent deficiency appropriations act (38 Stat. L. 219) approved October 22, 1913.

VII

The commission is an administrative tribunal, created by the interstate commerce act (24 Stat. L. 379), approved February 4, 1887, as amended, and particularly as amended by the transportation act of 1920 (41 Stat. L. 456), approved February 28, 1920, and its authority, powers and limitations are in said acts defined.

VIII

All of the statements of fact hereinafter made are true and
546 correct and were established in said proceeding before the commission by adequate, competent and uncontradicted evidence.

IX

Petitioners' steel plants represent an investment of more than $408,000,000 and employ approximately 45,000 men. Petitioners' coal mines represent an investment of more than $68,000,000 and employ

approximately 7,800 men. Petitioners' privately owned coal cars represent an investment of more than $8,000,000. Petitioners' plants, mines and cars together represent a total investment of more than $484,000,000, giving employment to over 52,000 men. Petitioners' mines are located on and served by the lines of The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Buffalo, Rochester & Pittsburgh Railway Company, and Cambria and Indiana Railroad Company, which said railroad companies either directly or through connecting carriers, reach and serve petitioner's steel plants aforementioned. All of said railroad companies and connecting carriers are subject to the interstate commerce act and were parties respondent in the aforesaid proceeding before the commission.

X

The coal mines operated by petitioners were acquired and are operated to produce coal of specific and unvarying metallurgical quality and in constant and adequate quantities necessary for production by petitioners of the modern grades of steel made at petitioners' steel plants above mentioned. The combined productive capacity of these mines is approximately 9,500,000 tons annually, but slightly less than the total annual coal requirements of petitioners at the steel plants aforesaid and, without important exception, no coal from petitioners' said mines, is shipped into, or sold in the open market. Petitioners' 3,975 privately owned coal cars are used exclusively in transporting petitioners' coal mined from petitioners' said mines to petitioners' said steel plants for petitioners' own consumption. Without important exception such cars of petitioners have never been
547 placed at other than petitioners' said mines and have never been used for shipment to destinations other than petitioners' said steel plants. Furthermore, petitioners' said 3,975 privately owned coal cars are sufficient in number and capacity to transport all of the coal produced at petitioners' mines at which they are placed and such mines rely for their car supply entirely upon such privately owned coal cars and customarily make no call upon or use of the carrier-owned coal cars operated upon the railroads serving petitioners' mines, which cars are hereinafter referred to as system cars.

Petitioners' said mines do not compete with mines producing coal for sale, either in the sale of coal or in the use of system cars.

XI

The circumstances which led to the acquisition and use of petitioners' coal cars were substantially as follows:

The science of steel making has undergone a process of continuing refinement, particularly in the last twenty years. The demands of modern industry call for ever increasing fineness and ever nicer distinctions in the chemical and physical properties of special grades

of steel. This is particularly true of such products as steel rails, bridge steel, car wheels and axles, automobile steel and ordnance steel, of all of which petitioners produce large quantities, having produced more than half of all of the ordnance steel ever used by the United States Government. The properties of any steel product are affected to a major and controlling degree by the properties of the coke used in the primary process of smelting the iron from the ore.

Chemical impurities, such as phosphorous and sulphur, when present in improper and unknown quantities in the coking coal, produce impure coke which in turn results in impure and defective steel. Petitioners' coke is produced in by-product ovens at its various plants, which ovens have during the last decade displaced the wasteful beehive ovens formerly operated at the coal mines.

Coal of improper or unknown physical properties when used
548 in petitioners' by-product ovens not only results in coke of insufficient physical strength to bear the burden of a blast furnace but may also cause swelling within the ovens so as to damage or destroy them with great and irreparable loss to petitioners through the injury to petitioners' plants and the interruption of petitioners' business. But fifteen per cent., approximately, of all bituminous coal is metallurgical coal suitable for steel making, and much of this is unsuitable for petitioners' uses. It has, therefore, been necessary for petitioners to acquire their own carefully selected coal mines producing coal of known, uniform and proper chemical and physical properties for petitioners' own uses, and petitioners' mines above mentioned were acquired to meet this necessity.

Furthermore, metallurgical coking coal cannot be successfully stored in substantial quantities or for substantial periods because, in addition to the great and impracticable expense and the risk of spontaneous combustion, such storage causes the coal to lose its "caking" or "coking" properties and thus renders it useless for petitioners' metallurgical processes.

For these reasons, it is necessary for the successful prosecution of petitioners' business, that petitioners shall receive a constant, adequate and fresh supply of their own coal from their own said carefully selected coal mines.

In times of normal and usual coal markets, petitioners believe and therefore aver that the railroads serving petitioners' mines could and can transport such a constant and adequate supply of petitioners' coal mined from petitioners' said mines to petitioners' said plants in the system cars operated upon such roads.

The normal coal needs of the country do not exceed ten (10) million tons per week whereas for extended periods in 1923 the railroads supplied transportation for a weekly coal production substantially in excess of eleven (11) million tons per week without delay, interruption or congestion. Commenting upon the demonstrated

adequacy of the country's railroads the commission in its
549 37th annual report issued December 1, 1923, said, inter alia, at pages 54, 55 and 56 thereof:

"During the first nine months of 1923 the carriers handled more freight traffic than during any previous corresponding period.

* * * * * * *

"Some of the outstanding factors which have made possible this hitherto unequaled transportation performance are (1) the condition of power and cars, (2) new locomotives and cars placed in service, and (3) increases in the mileage per car per day and loading of equipment.

* * * * * * *

"Notwithstanding the tremendous tonnage being handled, there were reported as of that date (October 1) 2,517 locomotives in good repair which were stored in anticipation of increased traffic demands."

Notwithstanding this demonstrated adequacy of public transportation facilities fully to meet the normal and usual transportation needs of the country, petitioners have been and will be compelled to reckon with extended periods of so-called "coal-car shortage." Such coal-car shortages have been and will be caused entirely or primarily by the following circumstances:

The bituminous coal-mining industry is vastly overdeveloped. The commission at page 535 of its original report in its docket No. 12530, hereinbefore referred to, made the following finding:

"There is enough bituminous coal in the ground in this country to more than supply the demands of all consumers for a long period. There are more than enough coal miners to produce coal for all purposes. There are more mines than is consistent with the economic use of equipment, and their aggregate capacity exceeds greatly the country's demand."

550 The United States Coal Commission in its report to the President of the United States, dated September 20, 1923, made the following finding which petitioners aver to be true:

"The fact of overdevelopment is stated most simply and most commonly by saying that, whereas the maximum annual demand for bituminous coal thus far, as measured by production, was 579,000,000 tons (in 1918) and for the 5 years 1917–1921, averaged 516,000,000 tons, the mines are equipped and managed to produce from 700,000,000 tons at the lowest estimate, upward to more than 800,000,000 tons of bituminous coal per year."

The finding of the commission at page 325 of its report In re Rules Governing Ratings of Coal Mines, Other Than Anthracite, and Distribution of Cars to Such Mines, Docket No. 13896, decided December 23, 1924, reported at 95 I. C. C. 309, indicates the present extent of this overdevelopment. It is there found that the daily ratings of coal mines upon the lines of coal-loading carriers repre-

senting seventy-seven per cent of the total coal production of the United States is at the present time 59,131 cars (of 50 tons each) per day. On the basis of this findings, the total daily ratings of all mines throughout the United States amounts to 76,793 such cars, or 3,838,650 tons per day. Assuming 300 shipping days per year, this total daily mine rating would result in the shipment of 1,151,595,000 tons per year, which is more than double the maximum demand of the country as found by the United States Coal Commission. In terms of developed capacity there are thus at the present time twice as many developed coal mines as the country needs.

Many of the excess or unneeded mines lie idle during times of normal and usual coal market, but whenever the coal market is subject to sufficient stimulus to produce accelerated coal buying, the excess idle mines come into operation and order cars placed
551 for loading with the result that extended periods of coal-car shortage are produced entailing "percentage distribution" of system cars.

During such periods of coal-car shortage, in any coal district, system cars are distributed ratably among the mines dependent upon system cars, according to their respective total orders or requirements, as a result whereof such mines, during any period of coal-car shortage, necessarily receive less than their full requirements of cars. Coal-car shortages may be either general or local, and the degree and duration of the shortage may vary at any given time on different railroads and different divisions of the same railroad, but during such periods of car shortage, mines dependent upon system cars often receive for extended periods but 50 per cent or less of the cars ordered. Furthermore, such conditions have occurred and are expected to occur notwithstanding that the railroads serving bituminous coal mines may be fully equipped with a legally adequate and sufficient supply of coal cars, for, as your petitioners are advised and believe and therefore aver, such railroads are not required by law to provide or furnish sufficient cars for such abnormal peak movements.

During such periods of coal-car shortage, it has been the practice of railroads, heretofore approved by the commission, to distribute the available supply of system cars on any given car distribution district ratably among the mines dependent upon system cars located thereon, as aforesaid, and at the same time to distribute all available privately owned coal cars on said district at the mines of their respective owners. Mines thus served through private cars do not receive any system cars, unless the number of private cars assigned to any such mine is less than the number of system cars to which, if it received no private cars, it would be entitled under the percentage of distribution of system cars, that day prevailing, and then only to the extent of such deficiency, and in practice, the private-car mines of your petitioners in times of coal-car shortage never receive system cars.

552 The ownership and use of private cars as aforesaid is the only available and lawful means by which a mine can secure its needed car supply during such periods of coal-car shortage.

Petitioners' privately owned coal cars were acquired in the years 1908, 1916, 1917, 1920, and 1923 for the sole purpose of assuring to petitioners a sufficient supply of coal cars in such coal-car shortage periods to take care of petitioners' needed and constant supply of metallurgical coal from petitioners' own mines for consumption at petitioners' own plants as aforesaid.

XII

The use of privately owned cars has always been recognized, permitted and enjoyed as a normal and lawful incident of railroad transportation. At the present time there are in service on American railroads approximately 2,30,221 private freight cars of all kinds, including box cars, tank cars, refrigerator cars, coal cars, and many other common and special types. This general body of private freight equipment represents an investment by more than 800 owners of approximately half a billion dollars. Of said freight cars 29,296 are privately owned coal cars which represent an investment of approximately 60 million dollars by more than 100 owners, for the most part coal operators, steel industries, and public utilities.

XIII

Petitioners' privately owned coal cars were acquired and were and are, and at all times herein mentioned have been, used as above described under a rule or regulation in effect upon the railroads serving petitioners' mines known as "the assigned-car rule" which rule was formulated and prescribed by the commission in 1907 and has been reaffirmed and approved by the commission on numerous subsequent occasions. The assigned-car rule may be stated as follows:

(a) Assigned cars are of three classes:

553 1. System fuel cars; i. e., cars assigned to mines on a coal-loading railroad for the fuel coal of that railroad;

2. Foreign fuel cars; i. e., cars of another railroad assigned to mines on a coal-loading railroad for the fuel of the former, and

3. Private cars; i. e., cars not railroad owned assigned to its own or other mines for the coal of the owner of the cars.

(b) All assigned cars must be placed at mines to which they are assigned.

(c) If the number of assigned cars equals or exceeds the number of cars to which the mine is that day entitled under the prevailing rate of system car distribution, the mine is not entitled to any system cars for loading that day.

(d) If the number of assigned cars does not equal the number of cars to which the mine is that day entitled under the prevailing rate of system car distribution, the mine is allowed sufficient system

cars in addition to bring its total placement that day up to the distributive share to which it is entitled.

The decisions and reports of the commission announcing and prescribing the assigned-car rule are as follows:

Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C. 398; Traer vs. Chicago & Alton R. R. Co., 13 I. C. C. 451; Royal Coal & Coke Co. vs. Southern Ry. Co., 13 I. C. C. 440; Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. 86; Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. 356; Assignments of Freight Cars, 57 I. C. C. 760; and said decisions and reports are hereby pleaded and referred to and included by reference in this petition with like effect as if set forth in extenso herein.

554 Said assigned-car rule has received the approval of the Supreme Court of the United States in Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S. 452, and Interstate Commerce Commission vs. Chicago & Alton Railroad Company, 215 U. S. 479.

Said assigned-car rule has received legislative sanction by the Congress of the United States and the practice prevailing under said rule is the practice referred to in the report of the Committee on Interstate and Foreign Commerce, House of Representatives, on Bill H. R. 10453 which became the transportation act, 1920, as "present practice" meaning thereby the practice then in effect.

A typical example of the operation of said "assigned-car rule" is as follows:

Assume a mine with a capacity of 30 cars per day and a "shortage" of system cars producing a prevailing 50 per cent. distribution.

If such a mine relies on system cars it is entitled to but 15 cars.

If, however, it has available 30 private cars, it is entitled to them all, but to no system cars in addition.

The order of the commission here complained of would prohibit that mine from using more than 15 cars, whether system, private or both.

XIV

Said assigned-car rule at all stages in its development and enunciation by the commission has recognized the right of the owners of private coal cars to their full and exclusive use. Petitioners are advised and therefore aver that the right of the shipper, the carrier being willing, to furnish and use his own vehicle for his own shipment has been recognized from the inception of railroad transportation in America and found sanction in the common law

555 prior to the passage of the act of Congress approved February 4, 1887, aforesaid and known, as amended, as the interstate commerce act, and further that said act, particularly by section 22 thereof preserves all rights existing at common law except as expressly provided to the contrary in said act, and further that said

act by section 15, paragraph 13 thereof, specifically recognizes the right of the shipper, the carrier being willing, to furnish instrumentalities used in the transportation of his shipment, and further that the interstate commerce act contains no provision denying or authorizing the commission to deny, or to order the carrier to deny, the right of a shipper to furnish and use private cars and particularly the right of your petitioners to furnish and use their private coal cars as hereinbefore described.

While by the order here complained of the commission has attempted to limit and prohibit, in large degree, the use of private coal cars by their owners, including your petitioners, the commission has not by said order, nor by any other order, rule or regulation, limited or prohibited in whole or in part, the full and exclusive use of privately owned cars, other than coal cars, by the owners thereof. The owners of such private cars, other than coal cars, have at all times in the past enjoyed and, even after the order here complained of shall become effective, will continu' to enjoy the full and exclusive use of their private cars and the use of the carrier facilities incident to their movement while your petitioners and other owners of private coal cars will be denied the full and exclusive use or movement of their said private coal cars.

XV

On March 22, 1921, the commission instituted an investigation upon its own motion by an order as follows:

"ORDER

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22nd day of March, A. D. 1921.

356 "No. 12350

"In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel.

"The matter of the distribution of cars among coal mines being under consideration,

"It is ordered, That the commission upon its own motion enter upon an investigation into and concerning the reasonableness and propriety of the present car distribution rules in so far as they apply to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as may appear to be necessary.

"It is further ordered, That copies of this order be served upon all carriers by railroad in the United States subject to the interstate commerce act, and that notice of this order be given to the general

public by depositing a copy of the order in the office of the secretary of the commission at Washington, D. C.

"And it is further ordered, That this proceeding be assigned for hearing at such times and places as the commission may hereafter direct.

"By the commission:

"[SEAL.] "GEORGE B. McGINTY,
Secretary."

All of said railroads subject to the jurisdiction of the commission, including all of the railroads over which petitioners' private cars move were made parties respondent in said proceeding before the commission but your petitioners were not made parties nor were they notified of said proceeding or summoned, or invited to present evidence therein of the manner of their use of their said private cars or the manner of the transportation of said private cars by the railroads over whose lines they moved.

At the hearings which were held in said proceeding, a few owners of private cars offered certain brief and general testimony relating to them and filed a brief presenting their position. On December 16, 1922, the original record in said proceeding before the commission was closed without any complete or comprehensive investigation of the use or movement of private cars generally or of petitioners' private cars in particular.

557

XVI

On June 13, 1923, the commission issued its report and order, which report is reported at 80 I. C. C. 520, and hereby referred to and included by reference in this petition with like force and effect as if set forth in extenso herein, and a true copy of said report and order is hereto annexed and hereby made part of this petition as Exhibit A. Said order is in words and figures as follows:

"ORDER

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of June, A. D. 1923.

"No. 12530.

"In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel.

"The Algoma Central & Hudson Bay Railway Company, etc. (here follow the names of all steam railroad carriers subject to the interstate commerce act); respondents.

"It appearing that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal,

with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary;

"It further appearing that said order dated March 22, 1921, was served in the manner provided by law upon all carriers by railroad in the United States subject to the interstate commerce act, said carriers being listed above and hereinafter referred to as respondents;

558 "It is further appearing that a full investigation of the matters and things involved has been had with respect to carriers serving bituminous-coal mines, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

"It further appearing that no reason appears for the continuance of the investigation as to carriers serving solely anthracite-coal mines:

"It is ordered that each of the respondents be, and each is hereby, notified and required to cease and desist, on or before September 1, 1923, and thereafter to abstain, from maintaining and enforcing, in so far as such respondent maintains and enforces, a regulation or practice whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars.

"It is further ordered that each of the respondents which distributes cars to bituminous-coal mines located upon its line or customarily dependent upon it for car supply be, and each is hereby, notified and required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share
559 of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

"It is further ordered, That the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, be, and it is hereby, discontinued.

"And it is further ordered, That this order shall continue in force until the further order of the commission.

"By the commission.

"[SEAL.] "GEORGE B. MCGINTY,
Secretary."

XVII

On or about July 20, 1923, your petitioners filed with the commission, their petition for a reopening of the proceeding aforesaid, Docket 12530, for rehearing and reargument to afford petitioners opportunity to present evidence relating to their situation herein referred to and to make argument upon such evidence and upon certain questions of law necessarily involved. Numerous other owners of private coal cars filed similar petitions as did the respondent railroad companies.

On July 25, 1923, the commission entered its order extending the effective date of its original order of June 13, 1923, hereinbefore referred to from September 1, 1923, to October 1, 1923, and thereafter by supplemental orders issuing from time to time extending said effective date to January 15, 1925. On October 5, 1923, the commission entered its order reopening the proceeding for further hearing upon the petitions for rehearing filed therein and providing for a further extension of the effective date of the original order until December 1, 1923. Thereafter, the commission on October 22nd to November 1st, 1923, inclusive, held further hearings in said proceedings receiving extensive and detailed further
300 evidence therein, particularly with reference to the use and movement of privately owned coal cars and especially the privately owned cars of your petitioners. On December 17th, 18th and 19th, 1923, the commission heard oral argument and received printed briefs upon the questions raised by said petitions for rehearing, including said petition of your petitioners herein, and at the conclusion of said oral argument the case stood submitted and was taken under advisement by the commission for the rendering in due course of a report and order therein upon rehearing as aforesaid.

XVIII

Under date of December 23, 1924, the commission issued its report and order on such further hearing which report is reported at 93 I. C. C. 701 and is hereby referred to and included by reference in this petition with like force and effect as if set forth *in extenso* herein, and a copy of said order is hereto annexed and hereby made a part of this petition as Exhibit B. Said order is in words and figures as follows:

"ORDER

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 23d day of December, A. D. 1924.

"No. 12530.

"In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel.

"It appearing, That by order date March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately-owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rules and regulations as might appear to be necessary;

"It further appearing, That by order entered June 13, 1923, the commission entered its order requiring the respondents to
561 change their practices with regard to the distribution of privately owned coal cars and cars placed for railway fuel coal so as to comply with the findings of the commission embodied in its report, filed herein, 80 I. C. C. 520;

"It further appearing, That by order entered on October 5, 1923, the commission reopened the case for further hearing, and pending its report on said further hearing, the effective date of said order entered on June 13, 1923, has been postponed until January 15, 1925;

"And it further appearing, That said further hearing has been had, and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and make a part hereof:

"It is ordered, That the order entered in this proceeding on June 13, 1923, be, and the same is hereby, further modified so as to become effective on March 1, 1925, instead of on said January 15, 1925;

"It is further ordered, That this order shall continue in force until the further order of the commission.

"By the commission.

"[SEAL.] GEORGE B. MCGINTY,
Secretary."

XIX

The effect of said order of June 13, 1923, as modified by said order of December 23, 1924 is to require the railroad companies, respondents in said proceedings, upon which petitioners' mines are located, to cease and desist from placing at any mine or mines of petitioners on any given car-distribution district of any of said railroads on any given day petitioners' privately owned coal cars to the full requirements of said mine or mines, unless on said day and district system cars are available for the full requirements of all mines relying on

system cars, or from placing at petitioners' mine or mines on said district on any given day petitioners' privately owned cars
562 then and there available on said district for distribution, in excess of the proportion of system cars available on the same day and district for the use of mines relying on system cars, although there is on said day and district an available full supply of petitioner's cars and although said railroad company is ready, able, and willing to place petitioners' cars at petitioners' mines, either to the full requirements thereof or to a proportion thereof in excess of the proportion of system cars available for mines relying thereon and has ample locomotives and other facilities for such placement and movement, and also for the placement and movement of all system cars, and irrespective of the cause of the shortage of system cars. And petitioners are advised and aver that the railroad companies over whose lines petitioners' cars move, have at all times been and are wholly willing and able to handle such cars for the movement of petitioners' shipments as in the past, and are and have been wholly able to handle private coal cars for all other shippers and receivers of coal desiring to supply them for such use, without undue preference as between such owners or undue prejudice to any other shippers or traffic, and that placement and movement of said cars has in no way limited or affected, and will not in the future limit or affect the available supply of system cars for placement at mines relying on system cars. Petitioners further aver that the effect of said order will be to deny to petitioners the right to have their cars placed and their coal moved at times when railroad companies serving their said mines are able to place and move said cars, together with all other traffic, and thus to interfere unduly and unlawfully with petitioners in the lawful and profitable prosecution of their business, and to deprive them of the lawful and profitable use of their privately owned coal cars, mines, and steel plants. Petitioners further aver that the effect of such order, in times of coal-car shortage, will be to retire a large number of cars available for use in transportation, to increase coal-car shortage and congestion, to reduce the amount of coal moved, and that such result will be effective
563 in periods when the country and its industries and citizens generally require all the coal that can possibly be moved. There are approximately 30,000 privately owned coal cars now in the service of the railroads of the United States, and the effect of the commission's said order, if enforced, will be to exclude from use one-half of such cars, or approximately 15,000 cars in periods of 50% car supply, thus increasing the coal-car shortage to the extent of 15,000 cars in such periods, and reducing the numbers of vehicles available to serve the country's coal needs, increasing congestion, and reducing the movement of coal.

XX

There was no competent evidence before the commission sufficient to sustain a finding that the existing practice hereinbefore described is unreasonable or results in undue discrimination.

There was no evidence of any preference or discrimination in the transportation of petitioners' cars, and no proof of a single instance in which locomotive, track, or other public facilities for transportation have been devoted preferentially to the movement of petitioners' cars, to the prejudice of the movement of coal in system cars, or to the prejudice of any other traffic whatsoever.

There was no evidence that said existing practice of placing petitioners' cars at petitioners' mines in the manner aforesaid in times of coal shortage had in any respect reduced or limited the number of system cars available for mines relying on system cars, located on the same railroads or the same divisions or car distribution districts thereof, or that, but for said practice, such mines located on the same railroads, divisions, or car-distribution districts would have been able to move any larger amount of coal than was actually moved at any time covered by the evidence before the commission.

On the contrary, as affirmatively appears from the report of the commission and from the record before the commission, the only effect of said order of the commission, if enforced, would be
564 to reduce the number of cars placed at petitioners' mines and the amount of coal moved for petitioners, without in any way increasing the number of cars available for placement at mines relying on system cars, or the amount of coal to be moved from such mines.

XXI

Said order of the commission is unlawful and void upon the following grounds:

(a) It is unsupported by the evidence.

(b) It is beyond the scope of the investigation of the commission as defined in its said order of March 22, 1921, in that the investigation so instituted is concerned only with rules governing the distribution of coal cars, whereas the order in substance and effect is an attempt to regulate in addition and primarily the use of tracks, locomotives, and other instrumentalities of transportation.

(c) It is based upon an erroneous conception of the commission's powers, either under paragraph 12 of section 1, or under any other section of the interstate commerce act, and is beyond the scope of the authority conferred upon the commission.

(d) Its primary purpose is to remedy what the commission conceives to be evils in the coal industry, and as such to regulate such industry, over the regulation of which the commission has not been vested with power.

(e) It is arbitrary and unreasonable, and involves the assumption of legislative and other powers not delegated to the commission.

(f) It will, if enforced, unlawfully deprive petitioners of the beneficial use of their private coal cars and their privately owned mines and steel plants, thus depriving them of their property without due process of law, in violation of the fifth amendment of the Constitution of the United States.

Wherefore complainants and each of them pray:

(a) That a temporary or interlocutory order or injunction
565 be entered restraining, enjoining, and suspending until further order of this court said order issued June 13, 1923, as modified by said order of December 23, 1924, and any regulations and practices affecting privately owned cars established in conformity therewith, until the final determination of this case.

(b) That this court adjudge, order, and decree that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it prohibits the placement, loading, or transportation of privately owned coal cars at the mines designated by the owner in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal-car shortage is beyond the lawful authority of the commission and is without warrant in law and null and void and that order be enjoined, set aside, and annulled.

(c) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it requires the carriers to cease and desist from regulations and practices permitting the placement and loading of petitioners' private cars at petitioners' mines in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars, is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(d) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it requires the carriers to establish, maintain, and enforce regulations and practices whereby petitioners' mines at which petitioners' privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mines' pro rata share of the total number of available cars, is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(e) That due and proper service of this petition be forthwith made by filing a copy of said petition in the office of the Secretary of the commission and in the Department of Justice as in said district court jurisdiction act provided.

566 (f) That your petitioners and each of them may have such other and further relief in the premises as to equity may

appertain and as may be deemed by this honorable court fit and proper.

And your petitioners as in duty bound will ever pray, etc.

[SEAL.] BETHLEHEM STEEL COMPANY,
By QUINCY BENT, *Vice President.*

Attest:
NORMORM BERKELEY,
Assistant Secretary.

[SEAL.] BETHLEHEM MINES CORPORATION,
By H. E. LEWIS, *Vice President.*

Attest:
R. E. MCMATH, *Secretary.*

[SEAL.] BETHLEHEM STEEL CORPORATION,
By A. JOHNSTON, *Vice President.*

Attest:
R. E. MCMATH, *Secretary.*

FREDERICK L. BALLARD,
FREDERICK H. WOOD,
HOYT A. MOORE,
PAUL D. CRAVATH,
CRAVATH, HENDERSON & DEGERSDORFF,
Counsel for Petitioners.

367 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
County of Northampton, ss:

Quincy Bent, being first duly sworn, deposes and says that he is an officer, to wit, vice president of Bethlehem Steel Company, one of the petitioners herein, and is authorized to sign the foregoing petition and to make this affidavit on its behalf; that he has read the foregoing petition and knows the contents thereof, and that the same are true to the best of his knowledge in so far as they relate to said Bethlehem Steel Company, and that as to the other matters therein set forth he is credibly informed and believes the same to be true.

QUINCY BENT.

Sworn to and subscribed before me this 26th day of February, 1925.

[SEAL.] H. M. WITMEYER,
Notary Public.

Commission expires April 1, 1927.

568 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
County of Northampton,

H. E. Lewis, being first duly sworn, deposes and says that he is an officer, to wit, vice president of Bethlehem Mines Corporation, one of the petitioners herein, and is authorized to sign the foregoing petition and to make this affidavit on its behalf; that he has read the foregoing petition and knows the contents thereof, and that the same are true to the best of his knowledge in so far as they relate to said Bethlehem Mines Corporation, and that as to the other matters therein set forth he is credibly informed and believes the same to be true.

H. E. LEWIS.

Sworn to and subscribed before me this 26th day of February, 1925.

[SEAL.] H. M. WITEMEYER,
Notary Public.

Commission expires April 1, 1927.

569–570 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
County of Northampton, ss:

A. Johnston, being first duly sworn, deposes and says that he is an officer, to wit, vice president of Bethlehem Steel Corporation, one of the petitioners herein, and is authorized to sign the foregoing petition and to make this affidavit on its behalf; that he has read the foregoing petition and knows the contents thereof, and that the same are true to the best of his knowledge in so far as they relate to said Bethlehem Steel Corporation, and that as to the other matters therein set forth he is credibly informed and believes the same to be true.

A. JOHNSTON.

Sworn to and subscribed before me this 26th day of February, 1925.

[SEAL.] H. M. WITEMEYER,
Notary Public.

Commission expires April 1, 1927.

571–808 [Omitted in printing.]

809–810 **In United States District Court**

No. 3273

[Title omitted.]

Petition of the Illinois Steel Company, Carnegie Steel Company, American Steel and Wire Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, H. C. Frick Coke Company, and United States Steel Corporation for leave to intervene

Filed Mar. 20, 1925

To the honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, sitting in equity:

Come now the Illinois Steel Company, Carnegie Steel Company, American Steel and Wire Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, H. C. Frick Coke Company, and United States Steel Corporation and respectfully
811 represent that the petitioners and each of them have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and to become parties to said proceeding, and for grounds of the proposed intervention say:

I

(a) Illinois Steel Company is a corporation of the State of Illinois engaged in the manufacture of steel products at Gary, in the State of Indiana, at South Chicago and Joliet, in the State of Illinois, and at Milwaukee, in the State of Wisconsin, all of which steel works are served by the line of railroad of the Elgin, Joliet and Eastern Railway Company with the exception of the works at Milwaukee which are served by the lines of railroad of the Chicago, Milwaukee and St. Paul and the Chicago and Northwestern Railway Companies.

(b) Carnegie Steel Company is a corporation of the State of New Jersey engaged in the manufacture of steel products at its various mills and furnaces located in the steel-producing districts in the western part of the State of Pennsylvania and the eastern part of Ohio, served by the respective lines of railroads of the various trunk lines situate in the districts above described.

(c) American Steel and Wire Company is a corporation of the State of New Jersey engaged in the manufacture of steel and wire products at its various mills located in the respective steel-producing districts in the States of Massachusetts, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, and Alabama and served by the respective

lines of railroads of the carriers situate in territories commonly known as the New England, official southern, and western trunk-line territories.

(d) National Tube Company is a corporation of the State
812 of New Jersey engaged in the manufacture of wrought pipe and tubular goods and steel rails at its various plants located in the steel-producing districts in the western part of Pennsylvania and in Ohio and West Virginia, and served by the respective lines of railroad situate in the official classification territory.

(e) American Sheet and Tin Plate Company is a corporation of the State of New Jersey engaged in the manufacture of sheet steel and tin plate at its various mills located in the steel-producing districts in the western part of Pennsylvania and in Ohio, West Virginia, and Indiana, and served by the respective official classification lines.

(f) United States Coal and Coke Company is a corporation of the State of West Virginia engaged in the mining and shipping of coal at its mines located at Lynch, in the State of Kentucky, served by the line of railroad of the Louisville and Nashville Railroad Company, and at Gary, in the State of West Virginia, served by the line of railroad of the Norfolk and Western Railway Company, and at Philippi, in the same State, served by the Baltimore and Ohio Railroad Company.

(g) United States Fuel Company is a corporation of the State of Illinois engaged in mining and shipping of coal at Benton, in the State of Illinois, served by the line of railroad of the Illinois Central Railroad Company.

(h) H. C. Frick Coke Company is a corporation of the State of Pennsylvania engaged in the mining and shipping of coal at its various mines in the coal-producing districts in Pennsylvania, served by the respective lines of railroad of the Baltimore and Ohio, Pittsburgh and Lake Erie, and Pennsylvania Railroad Companies.

(i) United States Steel Corporation is a corporation of the State of New Jersey. It owns all the capital stock, except directors' shares, of the other petitioners herein.

813 (j) The principal offices of the petitioners are as follows:

Carnegie Steel Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, and H. C. Frick Coke Company in the city of Pittsburgh, Allegheny County, State of Pennsylvania;

Illinois Steel Company in the city of Chicago, Cook County, State of Illinois;

American Steel and Wire Company in the city of Cleveland, Cuyahoga County, State of Ohio; and

United States Steel Corporation in the city of Hoboken, Hudson County, State of New Jersey.

II

Petitioners own, maintain, and furnish the following self-clearing hopper coal cars for use as hereinafter described:

United States Coal and Coke Company	2,240
United States Fuel Company	500
H. C. Frick Coke Company	1,314
Carnegie Steel Company	1,750
American Steel and Wire Company	225
Total	6,029

III

The products of the mines of the United States Coal and Coke Company, United States Fuel Company, and H. C. Frick Coke Company set forth in Pargraph I hereof are shipped to the respective plants of the manufacturing subsidiaries of the United States Steel Corporation, petitioners herein, in the manner hereinafter described.

814

IV

(a) Illinois Steel Company.

At the aforesaid steel works of the Illinois Steel Company located at Gary and Joliet, said company operates by-product coke ovens, where coke is manufactured from certain grades of bituminous coal for use in the making of steel. A large part of the gas secured from the by-product coke in Gary is furnished to the Gary Heat and Light Company, a public utility which supplies the city of Gary with heat, light, and power. The remainder of the gas is used by the said steel company in the process of manufacturing steel. The bituminous coal thus used is shipped from the Lynch, Kentucky, mines and the Gary, West Virginia mines of the United States Coal and Coke Company and from the Benton, Illinois, mines of the United States Fuel Company.

By reason of the fact that, in times of abnormal demand for cars resulting in car shortages, the Illinois Central has not had cars available or suitable for the transportation of coal in large quantities from the aforesaid Benton mines, the Illinois Steel Company, through its affiliated company, the United States Fuel Company, has on several occasions during recent years been compelled to furnish the cars for the movement of the coal from Benton to the by-product coke ovens at Joliet and Gary and also for the transportation of coal for steel-making purposes to the steel works at South Chicago.

Also by reason of the fact that the Louisville and Nashville did not have a sufficient supply of coal cars in times of abnormal demand to take care of the movement and transportation of coal from the Lynch mines to the various mills of the Illinois Steel Com-
815 pany, as aforesaid, said steel company, through its affiliated company, the United States Coal and Coke Company, since

beginning operation has been compelled to furnish the cars for the transportation of said coal.

(b) Carnegie Steel Company.

This company uses large quantities of gas and steam coal at its various plants located in the steel-producing districts as aforesaid, which coal is usually transported, partly in privately owned cars, from the mines of affiliated companies located in the western part of Pennsylvania.

(c) American Steel and Wire Company.

Large tonnages of coal are used by the American Steel and Wire Company in the manufacture of coke at its by-product coke ovens in the Cleveland district. This coal is shipped from the mines of affiliated companies located in the western part of the State of Pennsylvania and in West Virginia. It is transported largely in private cars of affiliated mining companies and moves over the lines of the Pennsylvania, New York Central, Erie, and Baltimore and Ohio. The steam coal comes mainly from the No. 8 district, in the State of Ohio, from mining companies not affiliated with any of the petitioners herein, and is transported largely in private cars of the wire company.

(d) National Tube Company.

The tube company operates a large by-product coke plant in Lorain, in the State of Ohio. The bituminous coal used is secured from the mines of the H. C. Frick Coke Company in Pennsylvania and from the mines of the United States Coal and Coke Company in West Virginia. More than fifty per cent of the coal from the Pennsylvania mines is shipped in privately owned cars of
816 affiliated mining companies and the remainder is shipped in equipment of the carriers. All of this coal is transported over the lines of the Pennsylvania, Baltimore and Ohio, and New York Central. The steam coal for the Ohio plants is secured from the No. 8 Ohio district. By-product coke is also produced in the ovens of the tube company in West Virginia. That coal is secured from the Pennsylvania mines of the Frick Coke Company and moves partly in private cars of affiliated companies.

(e) American Sheet and Tin Plate Company.

The Sheet and Tin Plate Company operates a large number of sheet and tin plate mills in the districts hereinbefore referred to, consuming a large tonnage of bituminous coal, which is moved partly in private cars owned by affiliated companies from the various mines of the Frick Coke Company and other affiliated interests.

V

None of the coal produced at any of the mines of the petitioning companies is or has been shipped or sold in the open market in competition with coal produced at mines commonly known as commercial mines or any other mines.

VI

Privately owned coal cars are essential to the economical operation of the petitioning steel manufacturing and coal mining companies and of the railroad companies serving them.

Manufacturing conditions peculiar to the steel industry make necessary a steady and continuous supply of raw materials, the most important of which is coal. Several tons of coal are re-
817 quired to produce a ton of finished steel. Experience has demonstrated that notwithstanding the furnishing by the carriers of a normal supply of cars, the carriers have been unable to furnish all the cars necessary to transport such large tonnages of this raw material in times of the peak demand when the traffic is abnormal.

Relying upon the right accorded shippers in interstate commerce to furnish their own cars for use in the transportation of their commodities by the provisions of paragraph 13, section 15, of the interstate commerce act (34 Stat. L. 584; 41 Stat. L. 488), and at the solicitation of the carriers themselves, your petitioners have invested over $16,000,000.00 in privately owned coal cars. Unless such cars are available for the transportation of your petitioners' coal as and when required, it will become necessary, in times of car shortages, to curtail the manufacture of coke and to close down part of the mills, resulting in irreparable damage and injury and the throwing out of employment of many thousands of men.

VII

For many years it has been the practice of the carriers to place at petitioners' mines for the transportation of petitioners' coal said privately owned cars in the following manner: If the number of such privately owned or assigned cars equalled or exceeded the number of cars to which the mines on that day were entitled under the prevailing rate of system car distribution, the mines were not entitled to any system cars for loading on that particular day. But if the number of privately owned or assigned cars did not equal the number of cars to which the mines on that day were entitled under the prevailing rate of system car distribution, the mines were allowed sufficient system cars in addition to bring their total placements
818 on that day up to the distributive share to which they were entitled. Such practice is in conformity with the long unbroken line of decisions and reports of the Interstate Commerce Commission, hereinafter referred to as the commission, announcing and prescribing the "assigned car rule," as set forth on page 11 of the petition of Bethlehem Steel Company and others in the present proceeding. Said decisions and reports are hereby pleaded and referred to and included by reference in this petition with like effect as if fully set forth herein.

Said rule of the commission has received the approval of the Supreme Court of the United States and legislative sanction by the Congress of the United States.

VIII

All the statements of fact above set forth are true and correct and were established by competent evidence in the proceedings before the commission entitled "Assigned Cars for Bituminous Coal Mines—Docket No. 12,530 in re Distribution Among Coal Mines of Privately-Owned Cars and Cars for Railroad Fuel."

The evidence above referred to is contained in the stenographer's official transcript of the testimony taken in the aforesaid proceedings and is upon file with the commission, and petitioners pray leave to refer to the same.

IX

Nevertheless, in its reports in said case (80 Interstate Commerce Reports at pages 520 et seq., and 93 Interstate Commerce Commission Reports at pages 701 et seq.) the commission found that the practice of the carriers in assigning privately-owned cars to bituminous coal mines in excess of the ratable share contemporaneously distributed to bituminous coal mines upon their lines which do not
819 receive privately owned cars is unjust and unreasonable and unduly prejudicial to mines not receiving such privately-owned cars, and unduly preferential of mines which are furnished such cars in excess of the ratable proportion.

The practice under the theretofore existing rule was as follows:

(a) Assume a mine with a capacity of 50 cars per day and a shortage of system or carriers' cars, resulting in a prevailing 50 per cent car distribution;

(b) A mine relying wholly on system or carriers' cars receives but 25 cars;

(c) If, however, a mine has available 50 cars of its own it is entitled to and receives them all, but no system or carriers' cars in addition.

The new rule of the commission, complained of herein, prohibits petitioners' mine which has available on that day 50 cars of its own from loading or shipping more than 25 cars, whether system, privately owned, or both.

X

Copies of said reports of the commission hereinbefore referred to in Paragraph IX hereof, and the orders made pursuant thereto, are annexed to the original petition (pp. 29 et seq.) of the Bethlehem Steel Company and others in the present proceeding, marked Exhibit A and B, respectively, and are hereby referred to and made part hereof, as if fully set forth herein.

XI

By the terms of the aforesaid order, in times of a shortage of system or carriers' coal freight cars, the carriers serving the
820 mines of your petitioners are prohibited from transporting from said mines petitioners' coal in petitioners' own cars in excess of the ratable share of all cars contemporaneously distributed to noncompetitive commercial mines which possess no private cars of their own—this, notwithstanding the fact that the carriers may have ample facilities available, such as engines, yards, and tracks that can be economically employed for the transportation of your petitioners' coal in petitioners' own cars and without discrimination against such other mines.

Petitioners are advised and aver that the carriers have been and are willing to transport such privately owned cars of any other shippper who may desire to supply them and which they are able to do without in any way affecting their ability to handle the traffic of such other shippers who neither possess, supply nor use privately owned cars for the transportation of their coals.

XII

Your petitioners respectfully represent that said order of the commission made pursuant to the reports hereinbefore referred to is invalid and void, for the following among other reasons:

1. It denies to petitioners the right to have their coal transported in their own cars at rates of freight lawfully on file with the commission by the carriers serving their mines at times when said carriers have ample motive power and other necessary facilities available for the transportation of petitioners' coal in said cars without discrimination and are willing to employ their transportation facilities for that purpose.

2. It is unsupported by evidence and is contrary to the evidence in the record.

821 3. It is inconsistent with former reports of said commission and is based upon an erroneous and incorrect statement of the law, and a misapprehension and misapplication of the evidence.

4. It is arbitrary, unreasonable, and in excess of the power of the commission for the reason, among others, that it prevents the carriers serving the respective mines of petitioners from transporting certain of the products of said mines offered to said carriers for transportation in interstate commerce and that at such times when the carriers can transport such products without discrimination against other mines and are willing so to do.

5. It will greatly damage and irreparably injure your petitioners.

6. It will, if enforced, unlawfully deprive petitioners of the beneficial use of their privately owned coal cars and their privately owned mines and steel plants, thus depriving them of their property

without due process of law, in violation of the fifth amendment of the Constitution of the United States.

XIII

Petitioners hereby reiterate and adopt all the allegations contained in the petition of the Bethlehem Steel Company, Bethlehem Mines Corporation and Bethlehem Steel Corporation, in so far as applicable to your petitioners and to the facts as hereinbefore set forth.

Wherefore petitioners, and each of them, pray:

(a) That leave be granted to your petitioners to intervene and be treated as parties hereto with the right to have notice of
822 and to appear at the taking of testimony, to produce, examine and cross-examine witnesses and to be heard in person or by counsel upon brief and at the oral argument.

(b) That a temporary or interlocutory order or injunction be entered restraining, enjoining, and suspending until further order of this court said order issued June 13, 1923, as modified by said order of December 23, 1924, and any regulations and practices affecting privately owned coal cars established in conformity therewith, until the final determination of this case.

(c) That this court adjudge, order and decree that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it prohibits the placement, loading or transportation of privately owned coal cars at the mines designated by the owner in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal-car shortage, is beyond the lawful authority of the commission and is without warrant in law and null and void, and that said order be enjoined, set aside, and annulled.

(d) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it requires the carriers to cease and desist from regulations and practices permitting the placement and loading of petitioners' private cars at petitioners' mines in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars, is beyond the lawful authority of the commission and without warrant in law and null and void, and that said order be enjoined, set aside, and annulled.

(e) That this court adjudge that said order of June 12, 1923, as modified by said order of December 23, 1924, in so far as it
823 requires the carriers to establish, maintain, and enforce regulations and practices whereby petitioners' mines at which petitioners' privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mines' pro rata share of the total number of available cars, is beyond the lawful authority of the commission and without warrant in law and null and void, and that said order be enjoined, set aside, and annulled.

(f) That this court order that due and proper service of this petition be forthwith made by filing a copy of said petition in the office of the secretary of the commission and in the Department of Justice, as in the district court jurisdiction act provided.

(g) That your petitioners and each of them may have such other and further relief in the premises as to equity may appertain and as may be deemed by this honorable court fit and proper.

And your petitioners as in duty bound will ever pray, etc.

(Signed) CHARLES S. BELSTERLING,
Solicitor for Petitioners.

RICHARD V. LINDABURY,
CHARLES MAC VEAGH,
Of Counsel.

824 [*Duly sworn to by W. H. Clingerman; jurat omitted in printing.*]

825-826 In United States District Court

No. 3273

[Title omitted.]

Petition of the Steel Company of Canada, Ltd., the Cleveland-Cliffs Iron Company, and Perry Iron Company for leave to intervene

Filed May 6, 1925

To the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania:

Come now the Steel Company of Canada, Ltd., the Cleveland-Cliffs Iron Company, and Perry Iron Company and respectfully represent that they and each of them have an interest in the matters in controversy in the above-entitled proceeding and desire to
827 intervene in and become parties to said proceeding and for grounds of the proposed intervention say:

I

(a) The Steel Company of Canada, Ltd., is a corporation of Canada, engaged in the manufacture, sale, and shipment of iron and steel products at plants operated by it at Hamilton, Ontario, and elsewhere in the Dominion of Canada. It owns an undivided one-third interest in the four hundred (400) private coal cars hereinafter referred to and also in the Mather Collieries coal property and mine located at Mather, Greene County, Pennsylvania, hereinafter referred to.

(b) The Cleveland-Cliffs Iron Company is an Ohio corporation engaged, among other things, in the business of attending to the

operations of blast furnaces and the supply of raw materials thereto, particularly the blast furnace of the Otis Steel Company at Cleveland, Ohio, in which it is interested, and those of the Trumbull Cliffs Furnace Company located at Warren, Ohio, in which it is interested. It is also the owner of an undivided one-third interest in the Mather Collieries coal property and mine and in the four hundred (400) private coal cars herein referred to.

(c) Perry Iron Company is a Delaware corporation engaged, among other things, in the manufacture of pig iron at Erie, Pa.; it is also interested through stock ownership in blast furnaces at Toledo and Canton, Ohio, and is the owner of an undivided one-third interest in the Mather Collieries coal property and mine and in the four hundred (400) private coal cars herein referred to.

Said Mather mine, at which said four hundred (400) private cars are used as hereinafter set forth, is operated for your petitioners by Pickands, Mather & Company, a copartnership of Cleveland, Ohio, as your petitioners' operating agents.

II

Your petitioners through their aforesaid respective interests in said Mather Collieries and mine and in the 400 private coal cars by which they respectively secure from said mine supplies of by-product coking coal for the respective by-product coke oven, blast furnace and steel operations in which they are interested, form three unified and integrated businesses for the production of iron and steel products uniting as aforesaid in the ownership and operation of said Mather Collieries and said 400 private coal cars for the production and supply of the fuel necessary for their respective operators. The term "petitioners" as used herein refers to said petitioners collectively and, in view of the unity of interest of petitioners, that term is used herein where the statement made may be true as to less than all of the petitioners considered as separate entities.

III

All of the statements of fact hereinafter made are true and correct and were established by adequate, competent, and uncontradicted evidence in the proceeding before the Interstate Commerce Commission (hereinafter called the "commission") referred to in the aforesaid petition of Bethlehem Steel Company et al. and known as "Assigned Cars for Bituminous Coal Mines, No. 12530, in re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel."

IV

Petitioners own, maintain, and furnish 400 open top freight cars (commonly known as coal cars) which are used in the transporta-

tion of coal from said coal mine to said steel and blast furnace plants for the consumption of your petitioners. All of the railroad companies over whose lines said transportation takes place are subject to the interstate commerce act and were parties respondent in the aforesaid proceeding before the commission.

V

Without important exception none of the coal produced at
829 petitioners' mine aforesaid is or has been shipped or sold in the open market in competition with coal produced at mines commonly known as commercial mines or at any other mines and petitioners' privately owned cars have never been used for the transportation of coal except to said steel and blast furnace plants in which petitioners are interested.

VI

Privately owned coal cars are essential to the economical prosecution of petitioners' business for the following reasons:

Manufacturing conditions peculiar to the steel and pig iron industry and prevailing in the operation of said steel and blast furnace plants make necessary a constant, uniform, and fresh supply of selected metallurgical coal of known and unvarying chemical and physical properties.

The facts and circumstances giving rise to this necessity in your petitioners' operations are substantially similar to those alleged in said petition of Bethlehem Steel Company et al., and particularly in paragraph XI thereof and said allegations are hereby referred to and adopted by your petitioners with like force and effect as if set forth in extenso herein.

Experience has demonstrated that notwithstanding the furnishing by the carriers of a supply of system coal cars adequate in times of normal and usual coal markets to meet the requirements of all coal mines, including petitioners' said mine, at irregular intervals and at times that cannot be anticipated and without reduction in the carriers' equipment, the carriers have been and will be unable to furnish all cars necessary to meet the requirements of all of the mines in times of peak demand and particularly when high coal prices bring into operation the large number of mines which do not operate in normal markets.

During such periods of so-called "coal car shortage" the available system cars are distributed ratably among the mines relying upon
830 system cars according to their respective orders or requirements with the result that such mines necessarily receive less than their full requirements of cars and in many instances less than fifty per cent thereof.

In order to provide sufficient cars during such periods of coal car shortage to transport from petitioners' said mine to

said plants the constant, uniform and fresh supply of metallurgical coal necessary for petitioners operations as aforesaid, petitioners have acquired, maintained, and furnished for such transportation their 400 private coal cars aforementioned.

VII

Petitioners' said cars have been furnished pursuant to the right recognized in the interstate commerce act and particularly in Section XV, paragraph 13, and in Section XXII thereof and said cars have been placed at petitioners' said mine and used for transportation of petitioners' said coal to petitioners' said plants as above set forth under and in conformity with a certain rule or regulation in effect upon the railroads serving petitioners' mine and known as "the assigned car rule." The development, sanction, effect, and operation of said assigned car rule are as set forth in the petition of Bethlehem Steel Company and others in this proceeding.

VIII

The order of the commission sought to be enjoined, set aside, and annulled in this proceeding is in words and figures as set forth in said petition of Bethlehem Steel Company and others; the effect of the enforcement of said order will be as set forth in said petition of Bethlehem Steel Company and others and the proceeding before the commission in which said order was entered was instituted, conducted and concluded as set forth in said petition of Bethlehem Steel Company and others. Petitioners hereby reiterate and adopt all the allegations contained in said petition of Bethlehem Steel Company and others in so far as applicable to this petition and to the facts herein stated with like force and effect as if said allegations were set forth in extenso herein.

851

IX

Said order of the commission, if enforced, will in times of coal car shortage prohibit the carriers serving petitioners' said mine from transporting from said mine petitioners' coal in petitioners' said cars for delivery and consumption at petitioners' said plants in excess of the ratable share of system cars contemporaneously distributed to noncompetitive commercial mines which possess no private cars of their own—this, notwithstanding the fact that said carriers may have available ample facilities, such as engines, yards and tracks that can be profitably employed for the transportation of petitioners' coal in petitioners' cars as aforesaid and without discrimination against such other mines.

Petitioners are advised and aver that the railroad companies over whose lines petitioners' cars move have at all times been and are

wholly willing and able to handle such cars for the movement of petitioners' shipments as in the past and are and have been wholly able to handle private coal cars for all other shippers and receivers of coal desiring to supply them for such use, without undue prejudice as between such owners or undue prejudice to any other shippers or traffic and that placement and movement of said cars has in no way limited or affected and will not in the future limit or affect the available supply of system cars for placement at mines relying on system cars.

Petitioners further aver that the effect of said order will be to deny to petitioners the right to have their cars placed and their coal moved at times when railroad companies serving their said mine are able to place and move said cars together with all other traffic and thus to interfere unlawfully and unduly with petitioners in the lawful and profitable prosecution of the r business and deprive them of the lawful and profitable use of their privately owned coal cars, mine and steel and blast furnace plants.

Said order of the commission is unlawful and void upon the following grounds:

832 (a) It is unsupported by the evidence.

(b) It is beyond the scope of the investigation of the commission as defined in its said order of March 22, 1921, in that the investigation so instituted is concerned only with rules governing the distribution of coal cars, whereas the order in substance and effect is an attempt to regulate in addition and primarily the use of tracks, locomotives, and other instrumentalities of transportation.

(c) It is based upon an erroneous conception of the commission's powers, either under paragraph 12 of Section 1, or under any other section of the interstate commerce act, and is beyond the scope of the authority conferred upon the commission.

(d) Its primary purpose is to remedy what the commission conceives to be evils in the coal industry, and as such to regulate such industry, over the regulation of which the commission has not been vested with power.

(e) It is arbitrary and unreasonable, and involves the assumption of legislative and other powers not delegated to the commission.

(f) It will, if enforced, unlawfully deprive petitioners of the beneficial use of their private coal cars and their privately owned mine and plants, thus depriving them of their property without due process of law, in violation of the fifth amendment of the Constitution of the United States.

Wherefore petitioners and each of them pray—

(a) That leave be granted to your petitioners to intervene in and be treated as parties hereto with the right to have notice of and to appear at the taking of testimony, to produce, examine, and cross-examine witnesses and to be heard in person or by counsel upon brief and at the oral argument.

(b) That a temporary or interlocutory order or injunction be entered restraining, enjoining, and suspending until further order of this court said order issued June 13, 1923, as modified by
833 said order of December 23, 1924, and any regulations and practices affecting privately owned coal cars established in conformity therewith, until the final determination of this case.

(c) That this court adjudge, order, and decree that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it prohibits the placement, loading, or transportation of privately owned coal cars at the mines designated by the owner in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal car shortage is beyond the lawful authority of the commission and is without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(d) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it requires the carriers to cease and desist from regulations and practices permitting the placement and loading of petitioners' private cars at petitioners' mine in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars, is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(e) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, in so far as it requires the carriers to establish, maintain, and enforce regulations and practices whereby petitioners' mine at which petitioners' privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mine's pro rata share of the total number of available cars, is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(f) That due and proper service of this petition be forthwith made by filing a copy of said petition in the office of the secretary of the commission and in the Department of Justice as in the district court jurisdiction act provided.

834 (g) That your petitioners and each of them may have such other and further relief in the premises as to equity may appertain and as may be deemed by this honorable court fit and proper.

And your petitioners as in duty bound will ever pray, etc.

(Sgd.) FREDERIC L. BALLARD,
" JOHN B. PUTNAM,
Solicitors for Petitioners.

835 [*Duly sworn to by H. G. Dalton; jurat omitted in printing.*]

836-837 In United States District Court

No. 3273

[Title omitted.]

Petition of the Youngstown Sheet and Tube Company for leave to intervene

Filed May 6, 1925

To the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania:

Comes now the Youngstown Sheet and Tube Company, and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding and for grounds of the proposed intervention says:

838

I

Petitioner is a corporation of the State of Ohio engaged in the manufacture, sale, and shipment of iron and steel products at plants operated by it at East Youngstown, Brier Hill, Hubbard, Warren, Girard, and Zanesville, in the State of Ohio, at Indiana Harbor, in the State of Indiana, at South Chicago and Evanston, in the State of Illinois, and at Mayville, in the State of Wisconsin.

II

Directly and through subsidiary coal companies in which petitioner owns all of the stock, petitioner owns 5 bituminous coal mines located in various coal-producing districts in the States of Pennsylvania, Ohio, and West Virginia. Said mines are referred to herein as petitioner's mines.

III

All of the statements of fact hereinafter made are true and correct and were established by adequate, competent, and uncontradicted evidence in the proceeding before the Interstate Commerce Commission (hereinafter called the "commission"), referred to in the aforesaid petition of Bethlehem Steel Company et al., and known as "Assigned Cars for Bituminous Coal Mines, No. 12530, in re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel."

IV

Petitioner owns, maintains, and furnishes 1,334 open-top freight cars (commonly known as coal cars), which are used in the trans-

portation of coal from said coal mines to said steel plants for the consumption of your petitioner.

All of the railroad companies over whose lines said transportation takes place are subject to the interstate commerce act and were parties respondent in the aforesaid proceeding before the commission.

839

V

Without important exception none of the coal produced at any of petitioner's mines is or has been shipped or sold in the open market in competition with coal produced at mines commonly known as commercial mines or at any other mines and petitioner's privately owned cars have never been used for the transportation of coal except to petitioner's steel plants for petitioner's own consumption.

VI

Privately owned coal cars are essential to the economical prosecution of petitioner's business for the following reasons:

Manufacturing conditions peculiar to the steel industry and prevailing in the operation of petitioner's said steel plants make necessary a constant, uniform and fresh supply of selected metallurgical coal of known and unvarying chemical and physical properties.

The facts and circumstances giving rise to this necessity in your petitioner's operations are substantially similar to those alleged in said petition of Bethlehem Steel Company et al., and particularly in paragraph XI thereof and said allegations are hereby referred to and adopted by your petitioner with like force and effect as if set forth in extenso herein.

Experience has demonstrated that notwithstanding the furnishing by the carriers of a supply of system coal cars adequate in times of normal and usual coal markets to meet the requirements of all coal mines, including petitioner's said mines, at irregular intervals and at times that cannot be anticipated and without reduction in the carrier's equipment, the carriers have been and will be unable to furnish all cars necessary to meet the requirements of all the mines in times of peak demand and particularly when high coal prices bring into operation the large number of coal mines which do not operate in normal markets.

840 During such periods of so-called "coal-car shortage" the available system cars are distributed ratably among the mines relying upon system cars according to their respective orders or requirements with the result that such mines necessarily receive less than their full requirements of cars and in many instances less than fifty per cent thereof.

In order to provide sufficient cars during such periods of coal-car shortage to transport from petitioner's said mines to petitioner's said plants the constant, uniform and fresh supply of metallurgical

coal necessary for petitioner's operations as aforesaid, petitioner has acquired, maintained and furnished for such transportation its 1334 private coal cars aforementioned.

VII

Petitioner's said cars have been furnished pursuant to the right recognized in the interstate commerce act and particularly in Section XV, paragraph 13, and in Section XXII thereof and said cars have been placed at petitioner's said mines and used for transportation of petitioner's said coal to petitioner's said plants as above set forth under and in conformity with a certain rule or regulation in effect upon the railroads serving petitioner's mines and known as "the assigned-car rule." The development, sanction, effect, and operation of said assigned-car rule are as set forth in the petition of Bethlehem Steel Company and others in this proceeding.

VIII

The order of the commission sought to be enjoined, set aside and annulled in this proceeding is in words and figures as set forth in said petition of Bethlehem Steel Company and others; the effect of the enforcement of said order will be as set forth in said petition of Bethlehem Steel Company and others and the proceeding before the commission in which said order was entered was instituted, conducted and concluded as set forth in said petition of Bethlehem Steel Company and others. Petitioner hereby reiterates and adopts all the allegations contained in said petition of Bethlehem Steel Company and others in so far as applicable to this petition and
841 to the facts herein stated with like force and effect as if said allegations were set forth in extenso herein.

IX

Said order of the commission, if enforced, will in times of coal-car shortage prohibit the carriers serving petitioner's said mines from transporting from said mines petitioner's coal in petitioner's said cars for delivery and consumption at petitioner's said plants in excess of the ratable share of system cars contemporaneously distributed to non-competitive commercial mines which possess no private cars of their own; this, notwithstanding the fact that said carriers may have available ample facilities, such as engines, yards and tracks that can be profitably employed for the transportation of petitioner's coal in petitioner's cars as aforesaid and without discrimination against such other mines.

Petitioner is advised and avers that the railroad companies over whose lines petitioner's cars move have at all times been and are wholly willing and able to handle such cars for the movement of

petitioner's shipments as in the past and are and have been wholly able to handle private coal cars for all other shippers and receivers of coal desiring to supply them for such use, without undue prejudice as between such owners or undue prejudice to any other shippers or traffic and that placement and movement of said cars has in no way limited or affected and will not in future limit or affect the available supply of system cars for placement at mines relying on system cars.

Petitioner further avers that the effect of said order will be to deny to petitioner the right to have its cars placed and its coal moved at times when railroad companies serving its said mines are able to place and move said cars together with all other traffic and thus to interfere unlawfully and unduly with petitioner in the lawful and profitable prosecution of its business and deprive it of the lawful and profitable use of its privately owned coal cars, mines and steel plants.

842 Said order of the commission is unlawful and void upon the following grounds:

(a) It is unsupported by the evidence.

(b) It is beyond the scope of the investigation of the commission as defined in its said order of March 22, 1921, in that the investigation so instituted is concerned only with rules governing the distribution of coal cars, whereas the order in substance and effect is an attempt to regulate in addition and primarily the use of tracks, locomotives and other instrumentalities of transportation.

(c) It is based upon an erroneous conception of the commission's powers, either under paragraph 12 of Section 1, or under any other section of the interstate commerce act, and is beyond the scope of the authority conferred upon the commission.

(d) Its primary purpose is to remedy what the commission conceives to be evils in the coal industry, and as such to regulate such industry, over the regulation of which the commission has not been vested with power.

(e) It is arbitrary and unreasonable, and involves the assumption of legislative and other powers not delegated to the commission.

(f) It will, if enforced, unlawfully deprive petitioner of the beneficial use of its private coal cars and its privately owned mines and steel plants, thus depriving it of its property without due process of law in violation of the fifth amendment of the Constitution of the United States.

Wherefore petitioner prays:

(a) That leave be granted to your petitioner to intervene in and be treated as a party hereto with the right to have notice of and to appear at the taking of testimony, to produce, examine and cross-examine witnesses and to be heard in person or by counsel upon brief and at the oral argument.

843 (b) That a temporary or interlocutory order or injunction be entered restraining, enjoining and suspending until further order of this court said order issued June 13, 1923, as modified by said order of December 23, 1924, and any regulations and practices

affecting privately owned coal cars established in conformity therewith until the final determination of this case.

(c) That this court adjudge, order, and decree that said order of June 13, 1923, as modified by said order of December 23, 1924, insofar as it prohibits the placement, loading or transportation of privately owned coal cars at the mines designated by the owner in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal-car shortage is beyond the lawful authority of the commission and is without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(d) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, insofar as it requires the carriers to cease and desist from regulations and practices permitting the placement and loading of petitioner's private cars at petitioner's mines in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(e) That this court adjudge that said order of June 13, 1923, as modified by said order of December 23, 1924, insofar as it requires the carriers to establish, maintain, and enforce regulations and practices whereby petitioner's mines at which petitioner's privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mines' pro rata share of the total number of available cars, is beyond the lawful authority of the commission and without warrant in law and null and void and that said order be enjoined, set aside, and annulled.

(f) That due and proper service of this petition be forth-
844 with made by filing a copy of said petition in the office of the secretary of the commission and in the Department of Justice as in the district court jurisdiction act provided.

(g) That your petitioner may have such other and further relief in the premises as to equity may appertain and as may be deemed by this honorable court fit and proper.

And your petitioner as in duty bound will ever pray, etc.

FREDERIC L. BALLARD,
L. A. MANCHESTER,
Solicitors for Petitioner.

[Duly sworn to by *W. J. Morris;* jurat omitted in printing.]

845–846 In United States District Court

No. 3273

[Title omitted.]

Answer of the United States

Filed April 3, 1925

United States of America for answer to the petition filed herein against it says:

I. On information and belief, defendant admits the facts alleged in Paragraph I in manner and form as alleged.

II, III, IV, V. Defendant has no knowledge of the matters and things alleged in Paragraphs II, III, IV, and V; it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

VI, VII. On information and belief, defendant admits the allegations of Paragraphs VI and VII in manner and form as alleged.

VIII, IX, X, XI, XII. Defendant has no knowledge of the matters and things alleged in Paragraphs VIII, IX, X, XI, and XII; it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits that in its Thirty-seventh Annual Report to Congress on December 1, 1923, the commission made the statements attributed to it; that in its original report in Docket
847 No. 12530 the commission made the statement * attributed to it; and in its report to the President on September 20, 1923, the United States Coal Commission made the statement attributed to it, and, subject to verification, the same are true statements; but defendant avers that each of the three statements is but an excerpt or fragment from each of the several reports referred to and if the subject matter referred to in the excerpts or fragments becomes material the several reports and each of them should be taken and considered in their entirety.

XIII. Defendant has no knowledge of the matters and things alleged in Paragraph XIII; it neither admits nor denies the same, and, in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits, subject to verification, that the commission made and published the six reports which are identified by the titles thereof.

XIV. Defendant has no knowledge of the matters and things alleged in Paragraph XIV; it neither admits nor denies the same, and, in so far as they may become material upon the hearing, it will require strict proof thereof.

XV. Defendant denies the matters and things alleged in Paragraph XV and each and every part of the same, in the manner and form as alleged, and all of the inferences sought to be created thereby,

* Through a typographical error, the words "There are more mines than is consistent with the most efficient use of equipment," etc., are erroneously written as "There are more mines than is consistent with the economic use of equipment," etc.

with this exception: Defendant admits the commission made and entered the order of March 22, 1921, and that all of the railroads subject to the jurisdiction of the commission were made parties respondent to the proceedings.

XVI. On information and belief, defendant admits the facts alleged in Paragraph XVI in manner and form as alleged.

XVII. On information and belief, defendant admits the facts alleged in Paragraph XVII in manner and form as alleged.

XVIII. On information and belief, defendant admits the facts alleged in Paragraph XVIII in manner and form as alleged.

XIX. Defendant has no knowledge of the matters and things alleged in Paragraph XIX; it neither admits nor denies the same, and, in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant denies the effect of the order of June 13, 1923, as modified by the order of December 23, 1924, is as averred.

XX. Defendant denies the matters and things alleged in Paragraph XX and each and every part of the same, in manner and form as alleged, and all of the inferences sought to be created thereby.

XXI. Defendant denies the matters and things alleged in Paragraph XXI and each and every part of the same, in manner and form as alleged, and all of the inferences sought to be created thereby.

Further answering, defendant alleges that the matters and things set forth in the petition and sought to be put in issue before the court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine, under the provisions of the interstate commerce act; in its reports in writing with respect thereto, made after full hearing and on due notice to all of the parties, which state its conclusions, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the commission, of which the parties were advised.

Defendant alleges that the facts set forth in the reports of the commission, and each and all of the same, are true and correct.

849 Defendant specifically denies:

(a) Any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the commission.

(b) Any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to

deny, or which are inconsistent with any fact or facts found by the commission.

(d) Any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the commission.

(e) Any fact or facts alleged in the petition, or any part of the same, which attack or which seek to attack the action of the commission, and to show facts other than what the commission has found and declared.

(f) Any allegations in the petition, or any part of the same, which allege that facts were found by the commission in its reports and orders which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

(h) Each and every allegation in the petition contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the petition be dismissed at the cost of petitioners and for such
850 other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
GEORGE W. COLE,
United States Attorney.

851 [*Duly sworn to by Blackburn Esterline; jurat omitted in printing.*]

852 In United States District Court

[Title omitted]

No. 3273

Intervention of Interstate Commerce Commission

Filed April 3, 1925

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, we hereby enter the appearance of the Interstate Commerce Commission, as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

P. J. FARRELL,
R. GRANVILLE CURRY.

853-854 IN UNITED STATES DISTRICT COURT

No. 3273

[Title omitted.]

Answer to Interstate Commerce Commission

Filed April 3, 1925

The Interstate Commerce Commission, intervening defendant in the above-entitled suit now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraphs I to VII, inclusive, of the petition, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

853 II

Answering Paragraphs VIII to XXI, inclusive, of the petition, the commission admits and alleges that by an order dated March 22, 1921, which order is referred to in Paragraph XV, the commission instituted a proceeding and an investigation on its own motion into and concerning the reasonableness and propriety of car-distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled "In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," and is on the docket of the commission as No. 12330; that all common carriers by railroad subject to the provisions of the interstate commerce act, including the railroads referred to in said Paragraph XV, were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further admits and alleges that it made and entered, and served upon all the respondents in said proceeding, the report and order of June 13, 1923, which is referred to in said Paragraph XVI.

The commission further admits that, as alleged in Para-
856 graph XVII, petitions for a reopening of said proceeding for rehearing and reargument were filed by petitioners herein and others; that the effective date of said order of June 13, 1923,

was by supplemental orders extended to January 15, 1925; that the proceeding was reopened for further hearing upon the petitions therein filed; that the commission held further hearings in said proceeding, heard oral argument, and received printed briefs upon the questions raised by said petitions; and at the conclusion of said oral argument the case stood submitted and was taken under advisement by the commission.

The commission further admits and alleges that thereafter it made and entered and served upon all the respondents in said proceeding its supplemental report and order of December 23, 1924, which is referred to in said Paragraph XVIII.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testimony and evidence submitted on behalf of petitioners herein by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, including briefs and
857 oral argument in behalf of petitioners herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered and served upon all the parties to said proceeding, said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, which included the commission's decision, conclusions, orders, and requirements in the premises.

The commission further alleges that in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, by their respective counsel, and all matters called to its attention by petitioners herein.

The commission further alleges that said order of June 13,
858 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it;

that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition. In particular the commission denies that irreparable injury or legal injury of any kind will result to petitioners, or any of them, if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by petitioners.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

859 [*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

860–861 In United States District Court

No. 3273

[Title omitted.]

Answer of Interstate Commerce Commission to the petition of the Illinois Steel Company, Carnegie Steel Company, American Steel and Wire Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, H. C. Frick Coke Company, and United States Steel Corporation, intervening petitioners.

Filed April 14, 1925.

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition of the intervening petitioners, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

862

I

Answering Paragraph I of the petition, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

II

Answering Paragraphs II to XIII, inclusive, of the petition, the commission alleges that by an order dated March 22, 1921, the commission instituted a proceeding and an investigation on its own motion into and concerning the reasonableness and propriety of car distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

Answering Paragraph VIII, the commission alleges that the request therein contained properly may not be acted upon favorably by the court unless and until a certified copy of all the evidence
863 before the commission in said proceeding is placed before the court for consideration as evidence in this case.

The commission admits and alleges that it made and entered and served upon all the respondents in said proceeding the two reports and orders which are referred to in Paragraphs IX and X, and alleges that the first report and order was made and entered on June 13, 1923, and the second report and order was made and entered on December 23, 1924.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testimony and evidence submitted on behalf of intervening petitioners herein, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, including briefs and oral argument in behalf of intervening petitioners herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding, said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, which included the commission's decisions, conclusions, orders, and requirements in the premises.

864 The commission further alleges that, in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, by their respective counsel and all matters called to its attention by intervening petitioners herein.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition. In particular the
865-866 commission denies that irreparable injury or legal injury of any kind will result to intervening petitioners, or any of them, if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by intervening petitioners.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

[*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

867–868 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission to the petition of the Steel Company of Canada, Ltd., the Cleveland-Cliffs Iron Company, and Perry Iron Company, intervening petitioners

Filed May 19, 1925

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition of the intervening petitioners, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraph I of the petition, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

869

II

Answering Paragraphs II to IX, inclusive, of the petition, the commission alleges that by an order dated March 22, 1921, the commission instituted a proceeding of investigation on its own motion into and concerning the reasonableness and propriety of car distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceedings so instituted was entitled In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testimony

and evidence submitted on behalf of the intervening peti-
870 tioners herein, by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, including briefs and oral argument in behalf of intervening petitioners herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, which included the commission's decisions, conclusions, orders, and requirements in the premises, and which are referred to in Paragraph VIII through incorporation therein of the allegations in the petition of Bethlehem Steel Company and others filed herein.

The commission further alleges that, in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully,
871 in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, and all matters called to its attention by the intervening petitioners herein.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition. In particular the commission denies that irreparable injury or legal injury of any kind will result to intervening petitioners, if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by intervening petitioners.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition of interveners, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report

and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

872 All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

[*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

873-874 In United States District Court

No. 3273

[Title omitted.]

Answer of Interstate Commerce Commission to the petition of the Youngstown Sheet and Tube Company, intervening petitioner

Filed May 19, 1925

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition of the intervening petitioner, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

875 Answering Paragraphs I and II of the petition, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

II

Answering Paragraphs III to IX, inclusive, of the petition, the commission alleges that by an order dated March 22, 1921, the commission instituted a proceeding of investigation on its own motion into and concerning the reasonableness and propriety of car distribution rules of carriers by railroad in the United States in so far as they applied to privately-owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled In re Distribution Among Coal Mines of Privately-Owned Cars and Cars for Railroad Fuel,

and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further alleges that subsequent to the service of said order of March 22, 1924, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testi-
876 mony and evidence submitted on behalf of the intervening petitioner herein, by its counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, including briefs and oral argument in behalf of intervening petitioner herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, which included the commission's decisions, conclusions, orders, and requirements in the premises, and which are referred to in Paragraph VIII through incorporation therein of the allegations in the petition of Bethlehem Steel Company and others filed herein.

The commission further alleges that, in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order
877 of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, and all matters called to its attention by the intervening petitioner herein.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition. In particular the commission denies that irreparable injury or legal injury of any kind will result to intervening petitioner if said order of June 13, 1923,

as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by intervening petitioner.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition, insofar as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order
878 of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

[*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

879–880 **In United States District Court**

[Title omitted.]

Petition of the Central Pennsylvania Coal Producers' Association for leave to intervene

Filed May 20, 1925

To the Honorable Judges of said Court:

881 Respectfully comes the petitioner, the Central Pennsylvania Coal Producers' Association and represents that it has a substantial interest in the matters in controversy in the above entitled proceeding, and desires to intervene as a party thereto, and to be represented therein by its counsel, and for grounds of the proposed intervention, says:

I

The Central Pennsylvania Coal Producers' Association is a voluntary unincorporated association of coal operators producing bituminous coal in the Clearfield or central Pennsylvania district, in the State of Pennsylvania, with its principal office in the city of Altoona, Pennsylvania.

II

That its constituent members are corporations, partnerships, and individuals engaged in producing bituminous coal in the aforesaid district in the the State of Pennsylvania; that they ship the same in interstate commerce; that their names, the locations of their mines

by railroad, and the location of their general offices are shown in the table hereto attached, marked "Exhibit A," which is made a part hereof.

That the corporations, partnerships, and individuals who are members of this petitioner produce annually in said Clearfield or central Pennsylvania district in the State of Pennsylvania, approximately thirty million tons of bituminous coal, a large proportion of which moves in interstate commerce.

882

III

That in the proceeding before the commission entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," petitioner actively participated both upon the original hearing and upon rehearing, offered testimony, submitted briefs, and at oral argument was heard by counsel.

IV

That the position of this petitioner was in opposition to the preferential distribution of coal cars at bituminous coal mines and in opposition to the proposed rules of coal car distribution contended for by carriers by railroad, and by owners and users of privately owned coal cars.

V

That the conclusions ultimately reached by the Interstate Commerce Commission, as well as by those adopted by it following the original hearing in the proceeding, were in consonance with the views held by petitioner and contended for by it.

VI

Petitioner respectfully represents that the orders of the Interstate Commerce Commission made in said proceeding, Docket No. 12530, as of June 13, 1923, and December 23, 1924, and reported at 80 I. C. C. 520 et seq. and 93 I. C. C. 701 et seq. are legal and valid and not in derogation of any legal right of the petitioners in this case.

882a

VII

That the Interstate Commerce Commission has appeared and intervened in this case as a party defendant; and the United States of America and Interstate Commerce Commission have filed answers to the petition of the petitioners therein.

VIII

That this petitioner for intervention, in so far as may be applicable, pertinent, appropriate, and permissible, hereby adopts the allegations, averments and denials contained in the answers of United States of America and Interstate Commerce Commission, with like

force and effect as if said allegations, averments, and denials were set forth in extenso herein.

Wherefore petitioner prays,

(a) That leave be granted to it to intervene in and be treated as a party hereto, with the right to have notice of and to appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and to be heard in person or by counsel upon brief and at the oral argument.

(b) That due and proper service of this petition for intervention be forthwith made in the manner prescribed and provided in the district court jurisdiction act.

(c) That this honorable court make such other orders in
882b respect of this petitioner's position upon the record and other procedural matters as may be appropriate.

(d) That the petition of the original petitioners in this case, be dismissed at their cost.

And your petitioner will ever pray, etc.

THE CENTRAL PENNSYLVANIA
COAL PRODUCERS' ASSOCIATION,
By A. M. LIVERIGHT,
Solicitor for Petitioner.

H. W. MOORE, *of Counsel.*

883 *[Duly sworn to by Charles O'Neill; jurat omitted in printing.]*

884 *Exhibit A to petition*

List of coal operators, showing also railroads on which their mines are located and location of their general offices

Railroad on which mines are located— Name of coal operator	Location of general offices
Buffalo, Rochester & Pittsburgh R. R.:	
Brush Creek Coal Mng. Co.	Indiana, Pa.
Coal Run Mng. Co.	Indiana, Pa.
Consolidated Coal & Coke Co.	Butler, Pa.
Comanshannock Coal & Coke Co.	Indiana, Pa.
Dilltown Smk. Coal Co.	Brookville, Pa.
Jefferson & Clearfield Coal & Iron Co.	Indiana, Pa.
Jefferson Coal Co.	Bethlehem, Pa.
Marion Center Coal Mng. Co., Inc.	Philadelphia, Pa.
Millrich Coal Co.	Rochester Mills, Pa.
Pittsburgh Gas Coal Co.	Indiana, Pa.
Punxsutawney Coal Mng. Co.	Buffalo, N. Y.
Rochester & Pittsburgh Coal & Iron Co.	Indiana, Pa.
Smith, Ira S.	Reynoldsville, Pa.
Standard Smk. Coal Co.	Indiana, Pa.
Tide Coal Mng. Co.	Indiana, Pa.
Williams Run Coal Co.	Punxsutawney.
885 Cambria & Indiana Railroad:	
Lincoln Coal Co.	New York, N. Y.
Nanty Glo Smk. Coal Co., Inc.	Nanty Glo, Pa.
Springfield Coal Co.	St. Benedict, Pa.
Springfield Coal Mng. Co.	St. Benedict, Pa.
Williams & Binder Coal Co.	Hollwood, Pa.
East Broad Top Railroad:	
Dunlap Coal Co.	Altoona, Pa.
Rockhill Coal & Iron Co.	Philadelphia, Pa.

Railroad on which mines are located Name of coal operator	Location of general offices
Huntingdon & Broad Top R. R.:	
Broad Top Coal Co.	Altoona, Pa.
Eichelberger & Co., E.	Saxton, Pa.
Johnstown & Stony Creek R. R.:	
Moxham Coal Co.	Johnstown, Pa.
Sunnyside Coal Co.	Johnstown, Pa.
New York Central Railroad:	
Ashman Coal Co.	Philipsburg, Pa.
Bellmore Coal Co.	Philipsburg, Pa.
Boardman Coal Mng. Co.	Clearfield, Pa.
886 Carnwath Coal Co.	Winburne, Pa.
Cunard Coal Co.	Morrisdale, Pa.
Decatur Coal Co.	Morrisdale, Pa.
Deringer Fuel Co.	Spangler, Pa.
Empire Coal Mng. Co.	Philadelphia, Pa.
Fall Brook Coal Co.	Corning, N. Y.
Goodyear, E. J.	Munson, Pa.
Horn, J. Edward	Philipsburg, Pa.
LaRayne Coal Co.	Beverdale, Pa.
Lee, Thomas J.	Philipsburg, Pa.
Maple Run Coal Co.	Clearfield, Pa.
Morrisdale Coal Co., The	Philadelphia, Pa.
Patchin Coal Mng. Co.	Glen Campbell, Pa.
Bald Hill Coal Co.	St. Benedict, Pa.
Carrolltown Coal Co.	St. Benedict, Pa.
Cherry Tree Coal Co.	St. Benedict, Pa.
Ellsworth-Dunham Coal Co.	St. Benedict, Pa.
Peale, Pacock & Kerr, Inc.	St. Benedict, Pa.
Royal Coal Co.	St. Benedict, Pa.
Russell Coal Mng. Co.	St. Benedict, Pa.
Potts Run Coal Co.	Clearfield, Pa.
Scott, H. B.	Philipsburg, Pa.
Shawnee Mining Co., Inc.	Ridgway, Pa.
Trojan Coal Mng. Co.	Clearfield, Pa.
Wood Coal Mng. Co., F. B.	Barnesboro, Pa.
Pennsylvania Railroad:	
Altoona Coal & Coke Co.	Altoona, Pa.
Argyle Coal Co.	Johnstown, Pa.
887 Axeima Coal Co.	Houtzdale, Pa.
Baker Coal Co.	Indiana, Pa.
Banks Coal Co.	Punxsutawney, Pa.
Banner Coal Mng. Co.	Osceola Mills, Pa.
Baxter Coal Co.	Kittanning, Pa.
Beahly Coal Co.	Johnstown, Pa.
Bear Rock Coal Co.	Lilly, Pa.
Beers, R. B.	Fallen Timber, Pa.
Biner Coal Mng. Co.	Carrolltown, Pa.
Boucher-Cortright Coal Co.	Philadelphia, Pa.
Bowersville Coal Mng. Co.	Punxsutawney, Pa.
Bulah Shaft Coal Co.	Ramey, Pa.
Burns Bros.	Houtzdale, Pa.
Calorie Coal Co.	Altoona, Pa.
Cambria Smk. Coal Co.	Johnstown, Pa.
Consumers Coll. Corp.	Batavia, N. Y.
Cortes Coal Co.	Punxsutawney, Pa.
Cushake Coal Mng. Co.	Burnside, Pa.
Deringer Bros.	Spangler, Pa.
Devine Coal Mng. Co.	New York, N. Y.
Dixonville Coal Co.	Johnstown, Pa.
Duncan-Spangler Coal Co.	Philadelphia, Pa.
Empire Coal Mng. Co.	Philadelphia, Pa.
Eyre Coll. Co.	Clearfield, Pa.
Fallen Timber Coal Co.	Philadelphia, Pa.

Railroad on which mines are located—Name of coal operator	Location of general offices
Pennsylvania Railroad—Continued.	
Garretts Run Coal Co.	Kittanning, Pa.
Glen White Coal & Lumber Co.	Baltimore, Md.
Gregory Coal Mng. Co.	South Fork, Pa.
Guernsey Coal Co.	Boston, Mass.
Hale Coal Co.	Phillipsburg, Pa.
Hastings Fuel Co.	Hastings, Pa.
888 Hawkins Coal Co.	Philipsburg, Pa.
Henrietta Coal Co., Inc.	Houtzdale, Pa.
Henrietta Coal Mng. Co.	New York, N. Y.
Homer City Coal Co.	Johnstown, Pa.
Hopkins Coal Co.	Lock Haven, Pa.
Hughes & Co., C. A.	Altoona, Pa.
Hughes & Co., W. H.	Altoona, Pa.
Irvona Coal & Coke Co.	Coalport, Pa.
Jamesville Coal Co.	Philipsburg, Pa.
Leland Coal Mng. Co.	New York, N. Y.
Lenox Coal Co.	Johnstown, Pa.
Logan Coal Co.	Philadelphia, Pa.
Maderia-Hill Coal Mng. Co.	Philipsburg, Pa.
Marion Center Coal Mng. Co., Inc.	Philadelphia, Pa.
Martins Branch Coal Mng. Co.	Portage, Pa.
Miller Coal Co.	Philadelphia, Pa.
Mineral Point Coal Co.	Johnstown, Pa.
Mountain Coal Co.	Greensburg, Pa.
McNeese-Reese Coal Co.	Kittanning, Pa.
Nugent Coal Co.	Morrisdale, Pa.
Oak Ridge Coal & Coke Co., Inc.	Hastings, Pa.
Patchin Coal Mng. Co.	Glen Campbell, Pa.
Peale, Peacock & Kerr, Inc.	St. Benedict, Pa.
Portage Coal Mng. Co.	St. Benedict, Pa.
889 Trout Run Coal Mng. Co.	St. Benedict, Pa.
Peerless Coal Mng. Co.	Clearfield, Pa.
Penelec Coal Corp.	Johnstown, Pa.
Penker Coal Mng. Co., Inc.	Portage, Pa.
Pine Valley Coal Co.	Hastings, Pa.
Piper & Co., W. H.	Philadelphia, Pa.
Plymouth Coal Mng. Co.	Philadelphia, Pa.
Pot Ridge Coal Co.	Windber, Pa.
Reed-Rudolph Coal Co.	Kittanning, Pa.
Regal Coal Mng. Co.	Clearfield, Pa.
Reilly Coal Co., Jos. H.	Philadelphia, Pa.
Rich Hill Coal Co.	Hastings, Pa.
Riverside Coal Mng. Co.	South Fork, Pa.
Rocky Ledge Coal Co.	Philipsburg, Pa.
Russett Coal Co.	Mineral Point, Pa.
Scalp Level Coal Mng. Co.	Windber, Pa.
Shoemaker Coal Mng. Co.	Philadelphia, Pa.
Sidson Fire Brick Co., Jos.	Connellsville, Pa.
Sonman Shaft Coal Co.	Sonman, Pa.
South Fork Coal Mng. Co.	Philadelphia, Pa.
South Fork Coll. Co.	South Fork, Pa.
Sterling Coal Co.	Philadelphia, Pa.
Stineman Coal & Coke Co.	Philadelphia, Pa.
Stineman, H. C.	South Fork, Pa.
Taylor & McCoy Coal & Coke Co.	Baltimore, Md.
890 Thermal Smk. Coal Co.	Johnstown, Pa.
Thomson-Lea Coal Mng. Co.	Philadelphia, Pa.
Verdun Coal Co., Inc.	Osceola Mills, Pa.
Wendell Coal Mng. Co.	Hooversville, Pa.
Wilmore Basin Coal Co.	Altoona, Pa.
Woodland Coal & Coke Co., Inc.	Philadelphia, Pa.

891–892 In United States District Court

No. 3273

Petition of Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation, for leave to intervene.

Filed May 21, 1925

To the honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, sitting in equity:

Come now the Pocahontas Operators' Association, the Empire Coal & Coke Company, and the Pocahontas Fuel Company, Incorporated, and respectfully represent that the petitioners, and each of them, have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and to become parties to said proceeding, and for grounds of the proposed intervention say:

The petitioner, Pocahontas Operators' Association is an
893 unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized and doing business under the laws of the State of West Virginia, and some of them chartered, organized and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia; said association being organized for the purpose of doing the work ordinarily done by the trade associations in connection with preserving and promoting the general interests of its members.

The petitioner, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

The petitioner, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

All of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia:

The principal offices of the petitioners are as follows:

Pocahontas Operators' Association, Bluefield, W. Va.

Empire Coal & Coke Company, Landgraff, W. Va.

Pocahontas Fuel Company, Incorporated, Boissevain, Va.

Petitioners file this petition in their own behalf, and also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracticable
894 to bring them all before the court, and these petitioners file this petition on behalf of the whole.

Petitioners, and those on whose behalf this petition is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these petitioners. Petitioners are therefore interested in the general question to be determined in this case.

Pocahontas Operators' Association, on behalf of all of its members, including said other petitioners herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief and presented oral argument before the commission against the contentions of the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and
895 manner claimed to be their right in the bill herein. These petitioners are therefore proper parties defendant in this suit.

Wherefore, these petitioners pray:

(a) That leave be granted them to intervene and to be treated as parties defendant herein, and that leave be granted them to file and an answer to the bill herein, with the right to have notice of and appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and be heard in person or by counsel, upon brief and in oral argument.

(b) That this court order that due and proper service of this petition be forthwith made, by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice, as in the District Court Jurisdiction Act provided, and by serving a copy hereof upon each of the complainants herein.

And your petitioners as in duty bound will ever pray, etc.

GREEVER & GILLESPIE,
Solicitors for Petitioners.

E. L. GREEVER, *of Counsel.*
J. F. BULLITT.

MAY, 1925.

896-898 [*Duly sworn to by Wm. C. Atwater et al., jurats omitted in printing.*]

899-900 In United States District Court

No. 3273

[Title omitted.]

Answer of the Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, incorporated, a corporation

These defendants, Pocahontas Operators' Association, Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, having been made parties defendant herein by order of court, for answer to the bill of complaint filed herein, say:

901 I

That the defendant, Pocahontas Operators' Association, is an unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized and doing business under the laws of the State of West Virginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia; said association being organized for the purpose of doing the work ordinarily done by trade associations in connection with preserving and promoting the general interests of its members.

That the defendant, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

That the defendant, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

That all of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia.

That the principal offices of these defendants are as follows:

Pocahontas Operators' Association, Bluefield, W. Va.

Empire Coal & Coke Company, Landgraff, W. Va.

Pocahontas Fuel Company, Incorporated, Boissevain, Va.

That the defendants file this answer in their own behalf, and
902 also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracticable to bring them all before the court, and these defendants file this answer on behalf of the whole.

That the defendants, and those on whose behalf this answer is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these defendants. Defendants are therefore interested in the general question to be determined in this case.

That Pocahontas Operators' Association, on behalf of all of its members, including said other defendants herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief and presented oral argument before the commission against the contentions of
963 the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and manner claimed to be their right in the bill herein.

II

That on information and belief, these defendants admit the facts alleged in Paragraphs I to VII, both inclusive, of the petition herein.

III

That defendants deny the allegations contained in Paragraph VIII of the said petition.

IV

That the defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraphs IX, X, and XI of the said petition, except that they admit that it is true as alleged in Paragraph IX of the petition, that "All of said railroad companies and connecting carriers are subject to the interstate commerce act and were parties respondent in the aforesaid proceedings before the commission," and admit that it is true as alleged in Paragraph XI of the petition, that "During such periods of coal car shortage

it has been the practice of the railroads, heretofore approved by the commission, to distribute the available supply of system cars on any given car distribution district, ratably among the mines dependent upon system cars located thereon, as aforesaid, and at the same
904 time to distribute all available privately owned cars on said district at the mines of their respective owners"; but defendants are advised and therefore aver and charge that the other allegations contained in said last mentioned paragraph of the petition are immaterial to the issues in this case, and said allegations do not tend to show that the reports and orders of the commission sought by the petition to be enjoined are either unjust or unlawful.

V

That the defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraph XII of the petition, but aver that the same are immaterial.

VI

That it may be true as alleged in Paragraph XIII of the petition, that "petitioners' privately owned coal cars were acquired and were and are, and at all times herein mentioned have been used as above described under a rule or regulation in effect upon the railroads serving petitioners' mines, known as the 'assigned-car rule,'" and it may be true as alleged in said Paragraph XIII of the petition that the so-called "assigned-car rule" is as there stated, but defendants are advised that, if true, these allegations are immaterial; and said defendants deny that it is true as alleged in said Paragraph XIII of the petition that "said assigned-car rule has received legislative sanction by the Congress of the United States," if it is
905 thereby meant that Congress has in any way sanctioned said assigned car rule so that the commission has not the authority and power to change the same, and to enter the reports and orders complained of in the petition.

VII

That defendants deny all the allegations contained in Paragraph XIV of the petition if they are construed to mean that the commission has by any former act or rule restricted or attempted to restrict its power so that it might not lawfully enter the reports and orders complained of in the petition.

Defendants further deny that it is true as alleged in Paragraph XIV of the petition that the interstate commerce act "particularly by section 22 thereof, reserves all rights existing in common law, except as expressly provided to the contrary in said act," but on the contrary aver that said section 22 refers only to remedies and not to "rights," and defendants further aver that nothing in section 15,

Paragraph XIII of the interstate commerce act "specifically recognizes the right of shippers, the carrier being willing, to furnish instrumentalities used in the transportation of a shipper" if it is meant thereby to allege that he may do so in any way or manner to obtain undue preference and discrimination in his favor or undue damage and prejudice to others, and defendants aver that it is within the power and authority of the commission to pass upon any such instrumentalities in order to determine whether or not such is preferential or prejudicial, and the finding of the commission on that question is final and binding.

906 Defendants are advised and aver that it is immaterial, whether or not it is true as alleged in said Paragraph XIV of the petition, that "the commission has not by said order, nor by any other order, rule, or regulation, limited or prohibited, in whole or in part, the full and exclusive use of privately owned cars, other than coal cars, by the owners thereof," since the question here involved is the validity or the binding effect of the order of the commission complained of as affecting distribution of privately owned coal cars, and has nothing to do with cars of any other kind.

Defendants further deny the general import of said Paragraph XIV of the petition, to the effect that the petitioners have the right to the "full and exclusive use" of their privately owned coal cars, and aver the fact to be that the right of the petitioners to use such cars is wholly subject to the statutory power of the commission to regulate such use.

VIII

That defendants admit the facts alleged in Paragraphs XV, XVI, XVII, and XVIII of the petition.

IX

That defendants admit that Paragraph XIX of the petition correctly sets forth the true intended meaning of the order of the commission dated June 13, 1923, as modified by its order of December 23, 1924, but defendants deny that it is true as alleged in said Paragraph XIX of the petition that the railroad companies

907 over whose lines the petitioners' cars move "are and have been wholly able to handle private coal cars for all other shippers and receivers of coal desiring to supply them for such use, without undue preference as between such owners or undue prejudice to any other shippers or traffic, and that placement and movement of said cars has in no way limited or affected, and will not in the future limit or affect, the available supply of system cars for placement at mines relying on system cars"; and further deny that it is true, as alleged in said Paragraph XIX of the petition, "that the effect of said order will be * * * to interfere unduly and unlawfully with petitioners in the lawful and profitable prosecution of their business

and to deprive them of the lawful and profitable use of their privately owned cars, mines, and steel plants"; but, on the contrary, defendants aver that the use of the petitioners' privately owned coal cars in the way and manner alleged in said paragraph to be their right, will result, as found by the commission, in undue preference to such owners and undue prejudice to other shippers and traffic.

Defendants further say that it is immaterial whether or not the effect of the order of the commission complained of will be as alleged in said paragraph of the petition, "to retire a large number of cars available for use in transportation," and aver that the fact of such retirement from service, if it be a fact, can not be used to justify the unlawful use thereof and thus create undue preference to their owners and undue prejudice to other shippers. Defendants further say that all the other allegations contained in said Paragraph XIX are immaterial.

908

X

That defendants deny that it is true as alleged in Paragraph XX of the petition that "there was no competent evidence before the commission sufficient to sustain a finding that the existing practice hereinbefore described is unreasonable or results in undue discrimination," and denies that, as alleged in said paragraph, "there was no evidence of any preference or discrimination in the transportation of petitioners' cars and no proof of a single instance in which locomotive, track, or other public facilities for transportation have been devoted preferentially to the movement of petitioners' cars, to the prejudice of the movement of coal in system cars or in prejudice of any traffic whatever," but on the contrary, aver the fact to be, as held by the commission, that said practice and method of transporting petitioners' cars would result in undue preference to petitioners and undue prejudice to other shippers.

Defendants further say that all other allegations contained in said paragraph are immaterial.

XI

That defendants deny that it is true as alleged in paragraph XXI of the petition, that "said order of the commission is unlawful and void" upon the grounds therein stated, or upon any other grounds.

XII

That defendants deny that the petitioners are entitled to the relief prayed for in the petition, or to any part thereof.

909

XIII

That these defendants here adopt and ask to be read as part hereof, as if herein set out in extenso, Paragraph II of the answer of the Interstate Commerce Commission filed to the petition herein.

XIV

That the defendants, in answer to the petition of the Illinois Steel Company, Carnegie Steel Company, American Steel & Wire Company, National Tube Company, American Sheet & Tin Plate Company, United States Coal & Coke Company, United States Fuel Company, H. C. Frick Coke Company, and United States Steel Corporation, for intervention as parties hereto, which petition adopts all the allegations contained in the aforementioned petition of the Bethlehem Steel Company and others, in so far as applicable to said Illinois Steel Company and others, say:

I

That the defendants admit the allegations contained in Paragraph I of said last-mentioned petition.

II

That the defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraphs II, III, IV, and V of the said last-mentioned petition.

910

III

That defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraph VI of the said last-named petition, but aver that however that may be, said allegations are immaterial to the issues in this cause.

IV

That these defendants have no knowledge as to the allegations of the fact contained in Paragraph VII of the petition except that they deny that there is anything in the line of decisions of the Interstate Commerce Commission referred thereto or in the alleged approval of the "assigned-car rule" by the Supreme Court of the United States, or in the alleged legislative sanction by the Congress of the United States, in any way limiting or restricting the power of the Interstate Commerce Commission so that it could not and did not lawfully enter the orders complained of in said last-mentioned petition.

V

That the defendants admit that the construction placed on the reports of the Interstate Commerce Commission in Paragraph IX of said last-mentioned petition is correct, and aver that said reports and orders of the commission are justified by the evidence before it, and were lawfully made within its statutory power.

911

VI

That the defendants deny that the result of the commission's order complained of is to prohibit the carriers serving petitioners' mines from transporting from said mines petitioners' coal in petitioners' own cars under any circumstances where such transportation would be "without discrimination against such other mines," or "without in any way affecting the ability of carriers to handle the traffic of such other shippers;" but aver the fact to be that any transportation of coal from their own mines in petitioners' own cars in excess of the regular share of all cars contemporaneously distributed to other mines is and would be unduly preferential to petitioners and unduly prejudicial to such other mines, and the commission has rightfully so found.

VII

Defendants deny that the said order of the commission complained of in the petition is invalid and void, as alleged in Paragraph XII of the petition, for the reasons therein set out, or for any other reason, and deny all the allegations of fact and all statements of conclusions contained in said Paragraph XII.

VIII

That the defendants deny that petitioners are entitled to the relief prayed for in their petition, or to any part thereof.

912

IX

That these defendants adopt and ask to be read as a part hereof, as if herein set out in extenso, Paragraph II of the Answer of the Interstate Commerce Commission filed to the petition of the said Illinois Steel Company et al.

X

Defendants further say that the use of privately owned cars in the manner alleged in the bill of complaint to be lawful, would result, as found and held by the commission, in undue preference and discrimination in favor of the mines to which they would be assigned, and in undue prejudice and damage to all other mines, which would result in the driving out of the business of mining and shipping coal of all mine owners not able or not willing to invest in cars for their own use. This preferential use of such cars is condemned by the commission in the reports and orders complained of, after considering full and complete evidence on the subject, and defendants are advised and aver that said reports and orders are plainly right and within the statutory powers of the commission.

The defendants further say that the use of privately owned cars lleged in the bill of complaint to be lawful, results in the taking of rivate property and property rights for the benefit of private nterests, which finds no justification under the law under any con-itions.

The commission might lawfully have held, in the exercise of its iscretion and within its statutory powers, that the moment the rivate owner of a car parts with its possession for hire to the railroad company it becomes a part of the equipment of the 13 railroad company and must be devoted, under the law, to the public service. Privately owned cars, in the use of railroad ompanies, are governed by all the laws regulating interstate com-erce, and are under the authority and control of the Interstate ommerce Commission.

This principle has long been recognized by the Interstate Com-erce Commission to the extent of exercising control over the op-rations of privately owned cars, and to the extent of requiring that hey be counted as part of the total supply of cars, and the statute ives the commission the power to fix the compensation to be paid y the carriers for their use.

In the orders of the commission under investigation in this case, he commission has declared that the mines served by the privately wned cars shall not receive from time to time more cars than their o rata shares when compared with other mines, holding that any ther practice is unduly discriminatory and preferential, and defend-nts are advised and aver that the commission might, in the exercise f its statutory discretion, have further held that in fact all coal rs for the use of which the railroad company pays must be counted, reated, and used in all respects as system cars.

Defendants further aver the facts to be in this case, as shown by he evidence introduced before the commission by the owners of said rivate cars, and admitted in the bill of complaint, that the railroad mpanies do not pay for the use of the privately owned cars in vidence before the commission an adequate compensation, but that ey pay amounts barely sufficient to keep up repairs on the cars. hese amounts do not provide for depreciation or for return on vested capital, and therefore the owners of said private cars in ct pay a bonus to the railroad companies in the form of furnishing vested capital free of charge, for which they receive in return the privilege of using the railroad companies' motive power, 14 road and terminal facilities, and administrative services, to a greater extent than can be used by others. While they nomi-ally pay the same freight rates on their coal as are paid by others, ey in fact pay a higher rate, for which they receive a different d better service, and, therefore, the owners of private cars operate der special contracts with the carriers, from the benefits of which

the general public is excluded because of lack of money or unwillingness to furnish the equipment necessary to give them such special and better service.

Defendants further say that they are advised and so aver the fact to be that any greater or better service afforded by the railroads to one or more mines than is furnished to other mines is unduly and unlawfully preferential and discriminatory, no matter for what reason it is given, and that all the allegations contained in the bill of complaint seeking to justify such practice are irrelevant and immaterial.

The complainants declare that by reason of their ownership of private cars they are entitled to have greater and better service from the railroad companies than said railroad companies can render to other shippers of coal, and declare that the said reports and orders of the commission deprive them of that greater and better service. Defendants are advised and so aver and charge that the law is that railroads shall furnish equal service to all, and this contemplates the fact of equal treatment under any and all circumstances, and it is contrary to the spirit of the law that any shipper may obtain a preferential service over other shippers under any conditions.

Wherefore, having fully answered, defendants pray that the bill of complaint be dismissed in this cause, and for such other and further order as may be proper.

In testimony whereof the defendant, Pocahontas Operators' Association, has caused its name to be signed hereto by its presi-
915–918 dent, and defendant, Empire Coal & Coke Company, has caused its name to be signed hereto by its president, with its corporate seal affixed, attested by its secretary, and defendant, Pocahontas Fuel Company, Incorporated, has caused its name to be signed hereto by its vice president, with its corporate seal affixed, attested by its secretary.

POCAHONTAS OPERATORS' ASSOCIATION,
By ....., *President.*
EMPIRE COAL & COKE COMPANY,
By ....., *President.*
Attest:
....., *Secretary.*
POCAHONTAS FUEL COMPANY, INCORPORATED,
By ....., *Vice President.*
Attest:
....., *Secretary.*
GREEVER & GILLESPIE, *Counsel for Defendants.*
....., *of Counsel.*

919 **In United States District Court**

[Title omitted.]

Amendments to answer

Filed May 26, 1925

For the purposes of this suit the counsel for the United States admits the allegations of fact contained in paragraphs II, III, IV, and V of the petition.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission, concede the railroad carriers over whose lines the cars of petitioners move have been and are willing to handle them.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

920 For the purposes of this suit the counsel for the United States admits the allegations of fact contained in paragraph I of the petition of intervention of the Illinois Steel Company et al.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission, admit for the purposes of this suit:

(a) The allegations of paragraph II of the petition of intervention of the Illinois Steel Company et al.

(b) The railroad carriers over whose lines the cars of the intervenors move have been and are willing to handle them.

(c) Products of the mines of the United States Coal and Coke Company, United States Fuel Company, and H. C. Frick Coke Company set forth in paragraph I of the petition for intervention are shipped to the respective plants of the manufacturing subsidiaries of the United States Steel Corporation, intervenors.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

921 In United States District Court

[Title omitted.]

Amendments to answer

Filed May 27, 1925

For the purposes of this suit the counsel for the United States admits the allegations of fact contained in paragraph I of the petition of intervention of the Steel Company of Canada et al.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission, admit, for the purposes of this suit, that intervenors own, maintain, and furnish 400 open-top freight cars, commonly known as coal cars, and that the railroad carriers over whose lines the cars of the intervenor move have been and are willing to handle them.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

922 For the purposes of this suit the counsel for the United States admits the allegations of fact contained in paragraphs I and II of the petition of the Youngstown Sheet & Tube Company, intervenor.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission, admit, for the purposes of this suit, that intervenor owns, maintains, and furnishes 1,334 open-top freight cars, commonly known as coal cars, and that the railroad carriers over whose lines the cars of the intervenor move have been and are willing to handle them.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

923 In United States District Court

Statement re opinion

For the opinion of the court, filed November 25, 1925, see record in the case of United States of America, defendant, and Interstate Commerce Commission, intervening defendant, vs. The Akron, Canton & Youngstown Railway Company et al.

924-925 **In United States District Court**

No. 3273

[Title omitted.]

926 Before the Honorable Victor B. Woolley, United States Circuit Judge, the Honorable J. Whitaker Thompson and the Honorable W. H. Seward Thomson, United States District Judges, sitting in the District Court pursuant to urgent deficiencies act (38 Stat. 219)

Final decree

Filed Dec. 15, 1925

This cause came on to be heard at this term on petition, answers, and evidence submitted, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the order of the Interstate Commerce Commission in the case entitled "Assigned Cars for Bituminous Coal Mines" (in re distribution among coal mines of privately owned cars and cars for railroad fuel), No. 12530, entered at a general session of the commission at its office in Washington, D. C., on June 13, 1923, as affirmed by its further order of December 23, 1924, be and the same is hereby set aside, annulled and suspended.

2. That a permanent injunction be and the same is hereby
927 granted and issued out of this court as prayed in the petition and the defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be and they are hereby permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

By the court:

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. WHITAKER THOMPSON,
W. H. S. THOMSON,
United States District Judges.

[File endorsement omitted.]

228 In United States District Court

No. 3273

[Title omitted.]

Petition for appeal by United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved by the final order or decree of the District Court made and entered December fifteenth, 1926, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

229 In United States District Court

No. 3273

[Title omitted.]

Assignments of error of the United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December fifteenth, 1926.

The District Court erred:

I. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1925.

II. In not dismissing the petition for want of equity.

III. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

IV. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

930 V. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft-coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

VI. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

VII. In holding "that the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

VIII. In holding "that there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

IX. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

X. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

XI. In holding that the "valuable legal right in the ownership of private cars * * * furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage."

XII. In holding that the compensation to the owners for the use by railroads of private cars has been fixed by the commission at one and one-half cents per mile.

XIII. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned-car mines will
931 result if the assigned car rule is abolished.

XIV. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

XV. In holding that "the right to the use of private cars" is not subordinate to the power of Congress and of the commission to regulate interstate commerce.

XVI. In failing to discriminate between the legal title of the petitioners in and to the cars and the use of the cars in interstate commerce over which the commission has full control.

XVII. In holding that the railroads can not reasonably secure an adequate supply of fuel under the order of the commission, and that, therefore, the present method of obtaining railroad fuel by the use of assigned cars is justified although the general public is thus served at the expense of other shippers and consumers of coal.

XVIII. In holding that the commission in prescribing reasonable and nonpreferential rules of car distribution can not treat upon the same basis as the other coal cars which the carrier owns or uses cars owned by private shippers and used by the carrier.

XIX. In ignoring the primary duty of the carriers under the interstate commerce act at all times to furnish transportation, including an adequate supply of cars.

XX. In not overruling the claim of coal shippers to the right in times of car shortage to the exclusive and preferential use of coal cars owned by them in possession of, operated, and otherwise treated by the several carriers as a part of their general operation and equipment.

XXI. In holding that rentals paid by carriers to the owners of private coal cars must be considered in determining rules by which carriers are to be governed in distributing coal cars.

XXII. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15) of section 1 of the interstate commerce act.

932 XXIII. In holding that the commission "has misconceived the purpose of paragraph (15) of section 1" of the interstate commerce act.

XXIV. (Error assigned by the United States only.) In failing to give full force and effect to paragraph (12) of section 1 of the interstate commerce act and in holding "We find it, however, unnecessary to base our conclusions in the case upon the construction of paragraph (12) of section 1, although its legislative history in connection with the administrative history of the assigned car rule has a bearing upon the question of the reasonableness of the order of the commission which is before us."

Wherefore defendants, and each of them, pray that the final order or decree of the District Court, entered December fifteenth, 1925, be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

933 **In United States District Court**

No. 3273

[Title omitted.]

Order allowing appeal of United States and Interstate Commerce Commission

Filed Feb. 8, 1926

In the above-entitled cause United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the district court, made and entered December fifteenth, 1925, and having also made and filed an assignment of errors and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which the said order or decree was made and entered to the Supreme Court of the United States.

VICTOR B. WOOLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

933a In United States District Court

No. 3273

[Title omitted.]

Praecipe for transcript of record

Filed Feb. 16, 1926

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Petition and exhibits thereto.
2. Intervening petition of Illinois Steel Company et al.
3. Intervening petition of Steel Company of Canada, Ltd.
4. Intervening petition of Youngstown Sheet and Tube Company.
5. Answer of United States and order that same shall stand as answer to the foregoing intervening petitions.
6. Intervention and answer of the commission to petition, and answers of the commission to the foregoing intervening petitions and each of them.

7. Intervening petition of The Central Pennsylvania Coal Producers' Association.

8. Intervening petition of Pocahontas Operators' Association et al. and answer.

933b 9. The following certified copies of reports and orders of the commission, viz:

Exhibit No. 15, No. 13896, In re Rules Governing Ratings of Coal Mines, etc., December 23, 1924, 95 I. C. C. 309, 389, report.

Exhibit No. 14, No. 12530, Assigned Cars for Bituminous Coal Mines, December 23, 1924, 95 I. C. C. 701, 754, report and order.

Exhibit No. 13, No. 12530, Assigned Cars for Bituminous Coal Mines, June 15, 1923, 80 I. C. C. 550, 589, report and order.

Exhibit No. 12, In re Assignment of Freight Cars, June 11, 1920, 57 I. C. C. 709–772, report and order.

Exhibit No. 11, No. 4986, In re Private Cars, July 31, 1918, 50 I. C. C. 652–718, report and order.

Exhibit No. 10, No. 9284, Car Supply Investigation, January 18, 1917, 42 I. C. C. 657, 706, report and order.

Exhibit No. 9, No. 1383, Hillsdale Coal & Coke Co. v. Pennsylvania Railroad, March 7, 1910, 19 I. C. C. 356, report and order.

Exhibit No. 8, No. 1322, Rail & River Coal Co. v. Baltimore & Ohio, June 2, 1908, 14 I. C. C. 86, 87–97, report and order.

Exhibit No. 7, No. 1305, No. 1306, No. 1307, Royal Coal & Coke Co. v. Southern Railway Co., April 13, 1908, 13 I. C. C. 440, 441, 450, report and order.

Exhibit No. 6, No. 1294, 1295, 1317, Traer v. Chicago & Alton (2 other cases), April 13, 1908, 13 I. C. C. 451, 459, report and order.

Exhibit No. 5, No. 1033, Ruttle v. Pere Marquette, March 2, 1908, 13 I. C. C. 179, 186, report.

Exhibit No. 4, No. 1008, Railroad Commission of Ohio v. Hocking Valley, July 11, 1907, 12 I. C. C. 466, 480, report.

Exhibit No. 3, orders in No. 12530 of date, respectively, July 25, 1923, September 12, 1923, October 9, 1923, November 6, 1923, December 14, 1923, December 19, 1923, March 3, 1924, May 6, 1924, June 30, 1924, October 22, 1924, December 9, 1924 (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

Exhibit No. 2, which consists of (a) order in No. 12530, March 22, 1921, one mimeograph page; (b) order in No. 13896, June 17, 1922, one page with 6 pages of rules attached (Exhibit A, 5½ pages, and Exhibit B, ½ page) (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

10. Exhibit No. 1, certified copy of the transcript of the record of the evidence and proceedings before the Interstate Commerce Commission offered by the counsel for the petitioners (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

933c 11. Certified copies of the following annual reports of the commission (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

Exhibit No. 16, 21st, 1907; December 23, 1907.
Exhibit No. 17, 34th, 1920; December 1, 1920.
Exhibit No. 18, 35th, 1921; December 1, 1921.
Exhibit No. 19, 36th, 1922; December 1, 1922.
Exhibit No. 20, 37th, 1923; December 1, 1923.
Exhibit No. 21, 38th, 1924; December 1, 1924.

12. Stipulation of counsel for the United States that certain allegations contained in the petition and intervening petitions are true.
13. Order of final submission.
14. Opinion of the district court.
15. Final decree.
16. All journal entries in their appropriate order.
17. Petition for appeal.
18. Assignment of errors.
19. Order allowing appeal.
20. Praecipe for record.
21. Summons and severance (two).
22. Notice to the attorney general of Pennsylvania.
23. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

Service of the foregoing praecipe for record and the receipt of a copy thereof are hereby admitted and acknowledged this 10th day of February, 1926.

FREDERIC L. BALLARD,
CHARLES S. BELSTERLING,
Solicitors for Appellees.

9854 In United States District Court

No. 3273

[Title omitted.]

Summons and Severance

Filed Feb. 18, 1926

To the Central Pennsylvania Coal Producers' Association, a voluntary unincorporated association:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are intervenor.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for

the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 11th day of February, 1926.

A. M. LIVERIGHT,
Solicitor for the Central Pennsylvania Coal Producers' Association.

934 In United States District Court

No. 3273

[Title omitted.]

Summons and Severance

Filed Feb. 10, 1926

To Pocahontas Operators' Association, an unincorporated voluntary association; Empire Coal & Coke Company, a corporation; and Pocahontas Fuel Company, Incorporated, a corporation:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are intervenors.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

_____,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 8th day of February, 1926.

E. L. GREEVER,
Solicitor for the foregoing intervenors.

935 In United States District Court

No. 3273

[Title omitted.]

Notice of appeal

Filed Feb. 11, 1926

To the Honorable George W. Woodruff, Attorney General of the State of Pennsylvania:

You are hereby notified that the defendants, United States of America and Interstate Commerce Commission, have taken an appeal from the final order or decree of the District Court, entered December 15, 1925, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of February, 1926.

GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

936 [Citation in usual form showing service on Frederic L. Ballard, filed Feb. 16, 1926, omitted in printing.]

937 [Clerk's Certificate to foregoing transcript, omitted in printing.]

938 [Caption omitted.]

939 In United States District Court, Eastern District of Pennsylvania

3273, DECEMBER TERM, 1924

Rainey Wood Coke Company, Seaboard By-product Coke Company, Chicago By-Product Coke Company, and Dooner-Hanna Coke Corporation, plaintiffs (Hause, Evans & Baker), vs. United States of America, Interstate Commerce Commission, defendants (George W. Coles, R. Granville Curry), and Central Penna. Coal Producers Ass'n, Pocohontas Operators Ass'n, et al., intervening defendants (J. F. Bullitt, Greever & Gillespie)

Docket entries

Feb. 28, 1925. Bill of complaint filed.
Feb. 28, 1925. Subpœna exit, returnable March 19, 1925.
Mar. 5, 1925. Subpœna returned, service admitted, and filed.
Mar. 27, 1925. Answer of Interstate Commerce Commission filed.
Apr. 2, 1925. Answer of United States filed.
May 20, 1925. Intervening petition of Central Penna. Coal Producers Association filed.
May 20, 1925. Certificate as to mailing copies of petition filed.
May 21, 1925. Petition of Pocohontas Operators' Association et al. for leave to intervene filed.
May 25, 1925. Argued.
May 26, 1925. Hearing continued.
May 27, 1925. Hearing continued.
940 May 27, 1925. Admission by United States of certain facts contained in bill of complaint filed.
May 28, 1925. Hearing continued.
May 29, 1925. Hearing concluded.
Nov. 25, 1925. Opinion, Thompson, J., setting aside and annulling and suspending enforcement of order of Interstate Commerce Commission, filed.
Dec. 15, 1925. Final decree filed.
Feb. 6, 1926. Assignment of errors by United States and Interstate Commerce Commission filed.
Feb. 6, 1926. Petition by United States and Interstate Commerce Commission for appeal filed.
Feb. 8, 1926. Decree granting petition for appeal of United States and Interstate Commerce Commission filed.
Feb. 8, 1926. Assignment of errors by Intervening defendants (Pocohontas Operators' Assn., Empire Coal & Coke Co., & Pocohontas Fuel Co., Inc.) filed.
Feb. 8, 1926. Petition for appeal by intervening defendants (Pocohontas Operators' Assn., Empire Coal & Coke Co., & Pocohontas Fuel Co., Inc.) filed.
Feb. 9, 1926. Acceptance of service by attorney general of Penna. of notice of appeal filed.
Feb. 9, 1926. Order of court granting prayer of petition for appeal of intervening defendants filed.
Feb. 9, 1926. Citation on behalf of intervening defendants exit.
Feb. 10, 1926. Summons and severance by defendants to intervening defendants filed.
Feb. 11, 1926. Notice of appeal by defendants and acknowledgement of service thereof filed.
Feb. 17, 1926. Citation by United States and Interstate Commerce Commission returned, service accepted, and filed.
Feb. 17, 1926. Praecipe as to transcript of record on appeal filed.
Feb. 18, 1926. Summons and severance by defendants to Central Pennsylvania Coal Producers' Association and acknowledgement of service thereof filed.
Feb. 25, 1926. Citation by intervening defendants returned, service accepted, and filed.

Feb. 25, 1926. Præcipe by plaintiffs for transcript of record sur appeal filed.

941 Mar. 5, 1926. Certified copy of decree extending time in which to complete appeal filed.

May 10, 1926. Certified copy of decree extending time to July 9, 1926, in which to file record sur appeal in Supreme Court filed.

July 7, 1926. Decree extending time to September 1, 1926, in which to file record in Supreme Court filed.

Sept. 1, 1926. Decree enlarging time in which to file record in Supreme Court filed.

Oct. 2, 1926. Cert. copy decree extending time in which to file record in Supreme Court filed.

Oct. 19, 1926. Stipulation of counsel as to transcript of testimony in narrative form filed.

Oct. 19, 1926. Narrative statement of testimony filed.

942–943 In United States District Court

[Title omitted.]

Bill of complaint

Filed Feb. 28, 1925

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, sitting in equity:

I

Your complainants, Rainey-Wood Coke Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company, and Donner-Hanna Coke Corporation, bring this their bill in equity against the United States of America and Interstate Commerce Commission for the purpose of enjoining, setting aside, and annulling a certain order of the Interstate Commerce Commission entered June 13, 1923, which said order was originally specified to become effective on September 1, 1923, and by successive supplemental
944 orders of the commission is now, by its order entered December 23, 1924, specified to become effective on March 1, 1925, in a proceeding began by the commission on its own motion and designated as—

ASSIGNED CARS FOR BITUMINOUS COAL MINES

No. 12530

In re distribution among coal mines of privately owned cars and cars for railroad fuel,

in so far as said order relates and applies to the distribution among bituminous coal mines of privately owned cars, and particularly in

so far as said order relates and applies to privately owned coal cars of complainants and of others similarly situated;

In support thereof your complainants allege and show—

II

Rainey-Wood Coke Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with principal office in Widener Building, city of Philadelphia, Pennsylvania, in the eastern district of Pennsylvania, and principal operating office at Swedeland, Montgomery County, Pennsylvania, in the eastern district of Pennsylvania, and therefore within and subject to the jurisdiction of this court, and owns and operates by-product coke ovens located at Swedeland aforesaid, consisting of one hundred and ten ovens and by-product recovery apparatus in connection therewith.

III

Seaboard By-Product Coke Company is a corporation organized and existing under the laws of the State of New Jersey, with principal office in the city of Newark, New Jersey, and owns and operates by-product coke ovens located at Kearney, New Jersey, near the city of Jersey City, in said State, consisting of one hundred and sixty-five ovens, by-product recovery apparatus in connection therewith, and water-gas-making apparatus.

945

IV

Chicago By-Product Coke Company is a corporation organized and existing under the laws of the State of Delaware, with principal office in the city of Wilmington, Delaware, and owns and operates by-product coke ovens located at Chicago, Illinois, consisting of one hundred and five ovens, by-product recovery apparatus in connection therewith and water-gas-making apparatus.

V

Donner-Hanna Coke Corporation is a corporation organized and existing under the laws of the State of New York, with principal office in the city of Buffalo, New York, and owns and operates by-product coke ovens located at Buffalo, New York, consisting of one hundred and fifty ovens, and by-product recovery apparatus in connection therewith.

VI

The defendant, United States of America, is a proper defendant in suits brought to enjoin, set aside, and annul orders of the Interstate Commerce Commission, by virtue of Commerce Court act (36 Statutes at Large 539), and district court jurisdiction act (38 Statutes at Large 219).

VII

The defendant, the Interstate Commerce Commission, is an administrative tribunal, created by the interstate commerce act (24 Statutes at Large 379), approved February 4, 1887, as amended, particularly by the transportation act, 1920 (41 Statutes at Large 456) approved February 28, 1920, and its authority, powers, and limitations are in said acts defined. Said Interstate Commerce Commission is hereinafter referred to as "commission."

VIII

946 Each complainant requires a constant supply of bituminous coal of uniform quality and character for the operations of its by-product coke ovens, for reasons more fully set forth hereinafter, and, for the purpose of providing for the regular and adequate transportation of their necessary supplies of said coal, complainants have heretofore acquired and now own the following numbers of standard hopper-bottomed steel coal cars, respectively, each with the investment therein as here stated:

Complainant	Number of cars	Investment
Rainey-Wood Coke Company	400	$1,500,000
Seaboard By-Product Coke Company	1,000	3,000,000
Chicago By-Product Coke Company [1]		
Donner-Hanna Coke Corporation	500	1,800,000
	1,900	6,300,000

[1] The Chicago By-Product Coke Company leases from Seaboard By-Product Coke Company and pertains for its use 650 of these cars.

At the present time, and for several years past, complainants have used the said cars in the transportation of coal from bituminous mines to their by-product coke plants under and in accordance with the so-called "assigned car rule," hereinafter referred to, as the same has been in force for many years upon the carriers over which shipments of said coal have moved.

The ownership and use of these cars as aforesaid is essential for each complainant for the purpose of assuring to them a constant and dependable supply of coal of the necessary quality and character required for their operations, and in particular for their business, as more fully set forth in succeeding paragraphs hereof.

IX

Complainants' said plants are of similar character and their business and operations are substantially alike. Each carbonizes bituminous coal, producing therefrom coke, gas, tar, and sulphate of ammonia. Rainey-Wood Coke Company and Donner-Hanna Coke

Corporation also produce light oils; Seaboard By-Product Coke Company and Chicago By-Product Coke Company do not recover the light oils, but in their operations these remain in the gas produced.

947 The quantities of coal annually carbonized in the plant of each complainant and the annual production therefrom is shown by the following table, the names of complainants being abbreviated for convenience:

Complainant	Coal, carbonized	Coke, and fuse	Gas, billion cu. ft.	Tar, million gals.	Sulphate of ammonia, million lbs.
Rainey-Wood	800,000	550,000	8	8	20
Seaboard	1,000,000	700,000	9	9	25
Chicago	750,000	550,000	12½	8	20
Donner-Hanna	1,000,000	700,000	0	9	25

Rainey-Wood Coke Company refines, from the light oils produced, approximately two (2) million gallons of benzol annually, used for motor fuel.

X

Coke produced by complainants is sold or used as follows:

For metallurgical uses in blast furnaces or foundries, in competition with beehive coke, chiefly made (a) in the so-called Connellsville region in the western part of Pennsylvania, in Westmoreland, Fayette, and Washington Counties; (b) in the Fairmont region, in the northern part of West Virginia; and (c) in the Birmingham district, in Alabama.

For making water gas by public-service corporations which distribute the same to the public under obligations as to quantity, quality, and British thermal unit or heat value content imposed by their franchises and the regulatory statutes of the States in which they operate. Coke so used is for public purposes and must be of quality and structure to produce gas to meet the standards imposed by said obligations, and is in competition with anthracite coal and with gas made by the coal-gas process, in which bituminous coal is used.

For industrial purposes in making steam the coke so used being of smaller sizes, and in competition with anthracite and bituminous coals and fuel oil.

For domestic purposes in the heating of houses, apartments, and other buildings, in competition with anthracite coal and fuel oil.

948 Coke supplied by complainants for making water gas for public distribution is furnished, inter alia, to public service gas companies named in and serving the territories described in the following table:

Complainant	Company	Territory served
Rainey Wood	United Gas Improvement Company	City of Philadelphia.
	Allentown-Bethlehem Gas Company	Cities of Allentown, Bethlehem, and near-by territory, Pennsylvania.
	Consumers' Gas Company	City of Reading and near-by territory, Pennsylvania.
	Philadelphia Suburban Gas & Electric Company	Phoenixville, Pottstown, and near-by territory, Pennsylvania.
	Easton Gas Company	City of Easton and near-by territory, Pennsylvania.
Seaboard	Operation of own water-gas plant, gas furnished to company named below	
	Public Service Gas & Electric Company	Northern & Central New Jersey, including Newark, Jersey City, Passaic, Paterson, and Hoboken.
	Brooklyn Union Gas Company	City of Brooklyn and near-by territory, New York.
	Consolidated Gas Co. of New York	City of New York and near-by territory, New York.
Chicago	Operation of own water-gas plant, gas furnished to company named below	
	Peoples Gas Light & Coke Company	City of Chicago and near-by territory, Illinois.
Berner-Hanna	Companies serving in	Western and central New York.

XI

Portions of the gas produced by complainants are used to operate their plants, and the balance is sold for industrial purposes and to public-service corporations which distribute the same to the public under the same obligations as are referred to in the preceding paragraph hereof. Gas made by complainants is so distributed by companies serving the territories shown in the following table, and complainants are obligated by contract to supply to said companies the quantity thereof stated for each:

Complainant	Company and quantity	Territory served
Rainey Wood	Counties Gas & Electric Company. Entire requirements	Boroughs of Norristown, Conshohocken, Bridgeport, Narberth, Ardmore, and substantially all of main line and Schuylkill Valley sections of Philadelphia district, Penna.
Seaboard	Public Service Gas & Electric Co., 25 million cu. feet per day	Northern and central New Jersey.
Chicago	Peoples Gas Light & Coke Company, 50 million cu. ft. per day	Chicago and adjacent district, Illinois.
Berner-Hanna	Iroquois Gas Corp., to supplement requirements not met by natural gas supply, 9 million cu. ft. per day	Buffalo and adjacent district, New York.

All of said public gas companies are dependent at all times upon the gas received from the respective complainants to enable them to meet and perform their public obligations and to maintain adequate and sufficient public service.

XII

Tar produced in complainants' plants is sold for use in the chemical, drug, dye, photographic, building, and road material and other industries dependent upon coal-tar products and for fuel in metallurgical industries.

Sulphate of ammonia is used as an important raw material in the manufacture of commercial fertilizers for agricultural and similar purposes.

Light oils produced are refined to produce benzol for motor fuel and, in times of war, toluol and other materials from which essential high explosives are made.

XIII

The coal cars owned by complainants, respectively, were acquired by each of them in the year 1920, and are used to transport specially selected bituminous coking coal to their respective plants, lo-
950 cated on lines of railroads shown in the following table, from coal mines located on the lines of railroad set out therein, said coal being transported over the lines of said railroads and others connecting therewith:

Complainant	Plant on lines of—	Mines—	
		In—	On lines of—
Rainey-Wood	Upper Merion & Plymouth R. R., Pennsylvania R. R. and Reading Co. as trunk line connections	Westmoreland and Fayette Counties, Pa.	Pennsylvania R. R., Baltimore & Ohio R. R., Pittsburgh & Lake Erie R. R., Monongahela Railway
Seaboard	Erie R. R., Delaware, Lackawanna and Western R. R.	West Virginia and Virginia	Chesapeake & Ohio Railway, movement to Gilbertville and thence by ocean
Chicago	Ill. Cen. R. R., Chi. & Ill. West. R. R., and Belt Line R. R., connecting in Chicago switching district with each trunk line entering Chicago	Harlan and Pike Counties, Kentucky	Louisville & Nashville R. R. and Chesapeake & Ohio Railway
Donner-Hanna	So. Buffalo Ry., Delaware, Lackawanna & Western R. R., Buffalo, Rochester & Pittsburgh Ry.	Westmoreland coal region and Allegheny and Indiana Counties, Pa.	Pennsylvania R. R., Baltimore & Ohio R. R., Pittsburgh & Lake Erie R. R., Buffalo, Roch. & Pitts. Ry.

All of the railroad companies named above were parties respondent in the proceeding before the Interstate Commerce Commission aforesaid, designated "Assigned cars for bituminous coal mines, Docket No. 12536."

All of said railroads have accepted complainants' cars for the transportation of said coal and now use and operate them on their respective lines for that purpose and have continuously done so since complainants acquired said cars. None of said railroads now refuse to accept, use, and operate the same as aforesaid.

Said coal cars are used to transport coal in interstate commerce on the lines of said railroads, respectively. However, the larger amount of coal transported in the coal cars of Rainey-Wood Coke Company moves over the lines of the Pennsylvania Railroad Company, the Reading Company, and Upper Merion and Plymouth Railroad Company, exclusively, within the State of Pennsylvania.

951

XIV

The circumstances which led to the acquisition and use of complainants' coal cars were as follows:

Complainants' by-product coke plants must operate continuously and receive a continuous supply of uniform grade of fresh-mined coals from particular selected mines.

1. Continued operation is necessary because—

(a) Public gas supply: Gas cannot be stored, but must be made by complainants each day to supply specified quantities to the distributing gas companies; otherwise heavy penalties are incurred by complainants. Coke must also be regularly made to be supplied to these and other gas companies to make water gas as added sources of public gas supply.

(b) Physical effect of interrupted operations on by-product coke plants: Complainants' plants cannot be shut down without great physical injury to the ovens and long delay in resuming production. The ovens are built of specially designed and selected silica brick and are operated at very high temperatures. It requires eight weeks to bring the ovens up to temperature before being charged with coal; rapid heating will expand the oven walls, destroy them, and require rebuilding substantially at replacement cost and with long delay. Likewise, sudden shut-downs wreck the ovens with even more serious results. Proper gradual cooling, repairs, and resumption of operations require upwards of four or more months in time and complete suspension of production.

2. Continuous supply of uniform grade of fresh-mined coal from particular selected mines is necessary because—

(a) Required because of public gas service: Coals used must give needed quantity of gas with required British thermal units, and must be free from sulphur and other elements dangerous to
952 gas consumers. Coals vary greatly in these respects, and gas yields may be very greatly reduced by use of improper coking coal. High sulphur coals are particularly unsuitable.

(b) Required to establish and maintain market for coke. The coke output must meet the most exacting requirements of all customers. Economic operation of by-product plants is impossible unless the coke produced is suitable in quality and structure for each of the purposes for which it is used. Otherwise, the cost of producing gas and other products is prohibitive and the plants cannot supply gas for public distribution. Coke must be produced for a variety of purposes, otherwise the available market is not broad enough to absorb the coke. All coke must therefore meet the most exacting requirements of prospective customers.

The fuels with which coke competes as hereinbefore set out are always available in uniform grades and are supplied with adequate transportation at all times. Beehive coke, anthracite coal, and fuel oil uniformly receive substantially full car supply; fuel oil is trans-

ported almost entirely in privately owned tank cars without restriction upon their use.

Only uniform high grade coke can meet this competition. Coke for water gas making must be substantially free from sulphur and phosphorus, low in ash, and with high fusing point of ash. Such coke can only be made from carefully established mixtures of uniformly prepared coal of proper selected qualities, constantly supplied. Coke for metallurgical purposes must be in fairly large and uniform sizes, of sufficient physical strength to bear the burden in blast furnaces and substantially free from sulphur and phosphorus. Otherwise, iron and steel products will be defective because of excess quantities of these elements. Coke for domestic trade must be low in ash, high in ash fusing point, and sufficiently strong in structure to stand shipment and handling.

Uniformity in coke is as essential as high quality. Buyers
953 of coke, especially for water-gas-making and metallurgical purposes, must know in advance what kind of products they will make from the coke used, which is impossible if the coke varies in quality. Coke will vary widely in quality when made from different kinds of coal or even different mixtures of coals. The effect upon the operations of customers, due to difference from coke customarily supplied, cannot be determined before the coke is used. Customers are, therefore, unable to test their operations in advance and the damage extends through a wide range and variety of cause and effect, the result from use of new coals or mixtures not being known for a considerable time after the coals are, in fact, used. Beehive coke, with which by-product coke competes for metallurgical purposes, is regularly made from coal from the same mine, always available, and is uniform in quality and character. By-product coke cannot successfully compete unless it has the same degree of uniformity, assured by a constant supply of uniform coal, uniformly prepared.

(c) Required because of physical effect of unknown and varying coals on plant during coking process: The inherent nature of the coals used must be and be known to be such that they will coke without injury to the ovens by expansion or crumbling during the process.

(1) Expansion: Certain coals expand during coking; the extent of expansion varies. Poor qualities of coal or coal whose behavior in coking is unknown to the operators may so far expand as entirely to wreck the ovens, requiring long time suspension and costing upwards of a million dollars to rebuild. Expanding coals can only be used in proper mixture with nonexpanding coals. Determination of the proper mixture requires test in test batteries of ovens, and when a suitable mixture has been established it is a serious risk to be compelled to change it for want of steady deliveries of the right coals due to failure of transportation or other cause.

(2) Crumbling: Certain coals will not form even moderate
954 sized pieces of coke; the product is in fine pieces, similar to

sand, and not coke at all. It can not be discharged from the ovens by usual equipment but the ovens must be closed and the contents raked out with consequent injury to the plant.

Chemical analysis of coals will not show in advance the results in the coking process, but only indicates whether it is worth while to run a test on a given coal. Coals from the same seams, with very similar analyses, behave very differently in coking and require widely different mixtures and plant operation.

Uniform preparation of the coal at the mines is essential. Different preparation at different mines or variations in preparation at the same mine will bring about widely different behavior in coking and in the yield and quality of gas and coke for established markets.

Coal must therefore be regularly procured from the same mines, the operators of which are known uniformly to prepare their coal.

Furthermore, coal for use in complainants' plants can not be successfully stored in substantial quantities or for substantial periods because of the great expense, deterioration, and risk of combustion. Storage causes the coal to lose its "coking" properties and thus renders the coke product useless for metallurgical use, and also substantially reduces the yield of gas therefrom.

Coals obtainable on the "spot" market and the coals generally offered for sale, which alone are available to complainants if the delivery at their plants of their own selected coals is interrupted, can not meet the above stated requirements.

For these reasons it is essential in the conduct of complainants' business that they receive regular deliveries of a constant, uniform, and adequate fresh supply of particular high grades of coal from carefully selected coal mines.

XV

955 Each of complainants, recognizing their need for constant supplies of proper and uniform coals, have heretofore carefully selected the mines from which to procure their coal, and have made contracts with the operators thereof for their requirements over extended periods. Complainants believe and therefore aver that the coal supplies so provided are sufficient in quantity and quality to safeguard the operations of their plants in respect of the matters set forth in the preceding paragraphs, if reasonably regular and constant transportation thereof from the mines to the plants can be had. Appropriate measures have therefore been taken by complainants to protect their business and plants subject only to such risks of interruption in transportation as might arise.

XVI

Complainants believe and therefore aver that in times of normal and regular markets for bituminous coal, and except when the lines of railroad are affected by extraordinary conditions such as strikes,

the railroads transporting complainants' coal can transport the necessary and constant supplies thereof to complainants' plants in carrier-owned cars (hereinafter referred to as "system cars"), and without the use of the privately owned coal cars of complainants.

However, the experience of complainants and others similarly situated has shown that for extended periods, frequently recurring, conditions arise which render the railroads serving complainants unable to provide sufficient system cars to transport complainants' coal to their plants and other coal currently offered for transportation. Said inability of the railroads is hereinafter referred to as "coal-car shortage." In such periods, the demand for placement of system cars at bituminous mines is in excess and frequently greatly in excess of the number of such cars available for distribution, and it is therefore not possible for mines supplying coal to complainants to receive the number of cars per day or other period necessary to transport the required amount of complainants' coal to their plants.

Under such circumstances, complainants were and are unable
956 to receive their needed coal supplies and their operations and plants jeopardized and interfered with as hereinbefore set out. For reasons stated in Paragraph XIV, complainants cannot use the miscellaneous coal which may be available on the open market during such periods, and inability to obtain their regular coal supplies is an extreme hazard in their business.

The experience of complainants has shown that during a coal-car shortage, the mines supplying their coal, if dependent upon system cars, would often receive over extended periods but fifty per cent. or less of the number of cars needed to transport the coal. These conditions occur and may be expected to recur notwithstanding that the railroads serving said mines may be equipped with a legally adequate supply of system coal cars, for, as complainants are advised, believe and therefore aver, said railroads are not required by law to provide or furnish sufficient system cars for abnormal peak demands.

Complainants are further advised and believe and therefore aver that coal-car shortages are due to the following circumstances which have heretofore existed and continue to exist:

The approximate weekly need for bituminous coal in the United States is ten million tons, while the weekly capacity of presently developed coal mines is twenty million tons. There are therefore excess mines, for the most part inefficient and high cost in operation, which lie idle when the demand for coal is normal and regular, but come into operation and demand placement of system coal cars when market conditions offer them prices at which they can advantageously operate. This extraordinary demand for system cars causes and is expected to continue from time to time to cause coal-car shortages, with resultant percentage distribution of system cars to coal mines.

Complainant's privately owned coal cars were acquired in 1920, after their experience had demonstrated that the use of these cars was the only available and lawful means by which the necessary number of cars for the transportation of their coal could be
957 provided during such periods and the coal be obtained. Experience in use of said cars under the rule hereinafter referred to has shown that they do fulfil the needs of complainants and safeguard delivery of their required coal supplies and thereby the operations of their plants and businesses.

XVII

Complainants' cars were so acquired and have been continuously used for the above-stated purposes under a rule or regulation in effect upon the railroads transporting complainants' coal known as the "assigned car rule," formulated and prescribed by the commission in 1907 and subsequently reaffirmed and approved by it in numerous proceedings. Said rule may be summarized as follows:

(a) Assigned cars are of three classes:

1. System fuel cars—i. e., cars sent to or assigned to mines on a railroad for loading its fuel coal.

2. Foreign system fuel cars—i. e., cars of one railroad sent to or assigned to mines on another railroad for loading the fuel of the former.

3. Private cars—i. e., noncarrier-owned cars sent by the car owner to its own or other mines for loading coal for the use or disposition of the car owner.

(b) All assigned cars must be placed at the mines to which they are so sent or assigned.

(c) If the number of assigned cars so placed at one mine equals or exceeds the total of cars to which it is that day entitled under the prevailing rate of car distribution among all mines in the district, it is not entitled to placement of any system cars.

(d) If not, the mine is entitled to placement that day of sufficient system cars in addition so that the aggregate placement at it is equal to its said prorata distributive share.

958 The following decisions and reports of the commission in respect of said rule are hereby pleaded, referred to, and included herein by reference with the same effect as if set forth in extenso, to wit:

Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C. 398;

Tracy vs. Chicago & Alton R. R. Co., 13 I. C. C. 451;

Ruttle vs. Pere Marquette R. R. Co., 13 I. C. C. 179;

Royal Coal & Coke Co. vs. Southern Ry. Co., 13 I. C. C. 440;

Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. 86;

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. 356;

In re Private Cars, 50 I. C. C. 652;

Assignment of Freight Cars, 57 I. C. C. 760.

An example of the application of said rule, involving private cars, is as follows:

Assume: Mine capacity of 30 cars per day; current system car distribution, 50 per cent, so that the mine is entitled to placement of not to exceed 15 system cars.

If private cars are assigned to it by their owner, and 30 thereof are available in its locality for placement, it is entitled to have all of them placed, to be loaded and moved out.

The order of the commission here complained of would prohibit the placement of more than 15 of said private cars at the mine, and the remaining 15 private cars would either remain idle and unplaced (notwithstanding ample facilities of the railroad in motive power, labor, trackage, and otherwise are available to place and remove them when loaded without delay in service to any others) or would be treated as system cars and be placed at other mines for moving coal for and to others than their owner and without compensation to said owner. The alternative is so stated
959 because complainants are advised said order of the commission does not clearly provide what disposition will hereafter be made of said 15 private cars under such circumstances. If the order is to be interpreted to provide for such other use, said order is averred to be unlawful and a taking of complainants' property in said cars without due process of law, contrary to the Constitution of the United States.

XVIII

Complainants are advised, believe, and therefore aver that, under the common law, a shipper is entitled to furnish and have his own car used and operated for the transportation of his goods; that with respect to railroads operating within the State of Pennsylvania, including therefore all of the railroads named in Paragraph XIII hereof except Chesapeake & Ohio Railroad Company, Louisville & Nashville Railroad Company, South Buffalo Railway Company, Belt Line Rail Road Company, Illinois Central Rail Road Company, and Chicago and Illinois Western Railroad Company, it is the duty of the railroad under its charter and the statutes of said State to accept such private cars and to transport therein exclusively the goods of the owner thereof whenever it has motive power, labor, trackage, and other facilities available for so doing without undue delay in the transportation of the goods and/or cars of others; that said right is sanctioned by the act of Congress approved February 4, 1887, aforesaid, and known as amended as the interstate commerce act, and that said right is provided for by said act as to all carriers subject thereto whenever the carrier is willing to and does accept said cars for such transportation. Complainants further aver that section 22 of said act expressly preserves all rights existing at common law and by State law, except as expressly provided to the contrary in other sections of said act, and that no other sections or

portions thereof have or do deny or impair said right of shippers and said duty of carriers. On the contrary, paragraphs 14 of section 1 and 13 of section 15 of said act specifically recognize said
960 right of shippers to furnish cars for the transportation of their goods and said duty of carriers to accept, use, and operate the same.

Complainants hereby refer to and plead the following acts of the General Assembly of the Commonwealth of Pennsylvania under which arises the aforesaid duty of carriers subject thereto:

Acts approved April 15, 1834, P. L. 508; February 19, 1849, P. L. 79; April 4, 1868, P. L. 62; April 13, 1846, P. L. 312 (an act to incorporate the Pennsylvania Railroad Company); act of April 4, 1833, P. L. 144 (an act to authorize the governor to incorporate the Philadelphia & Reading Railroad Company, now the Reading Company), and supplements and amendments thereto.

XIX

On March 22, 1921, the commission instituted an investigation upon its own motion by an order as follows:

"ORDER

"At the general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22nd day of March, A. D. 1921

"No. 12530

"In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

"The matter of the distribution of cars among coal mines being under consideration.

"It is ordered, That the commission upon its own motion enter upon an investigation into and concerning the reasonableness and propriety of the present car distribution rules in so far as they apply to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as may appear to be necessary.

"It is further ordered, That copies of this order be served upon all carriers by railroad in the United States subject to the interstate commerce act, and that notice of this order be given to the
961 general public by depositing a copy of the order in the office of the secretary of the commission at Washington, D. C.

"And it is further ordered, That this proceeding be assigned for hearing at such times and places as the commission may hereafter direct.

"By the commission.

"[SEAL.]

GEORGE B. MCGINTY,
Secretary.

Said matter was so proceeded with before said commission that on June 13, 1923, it issued its report and order, which report is reported at 80 I. C. C. 520, and is hereby referred to and included by reference herein with the same effect as if here set forth in extensio, and a true copy of said order is hereto annexed and hereby made part of this bill of complaint.

By said order each of the respondents therein, including all of the railroads named in Paragraph XIII hereof, were required to cease and desist from maintaining and enforcing any rule, regulation, or practice—

"whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars," and further, each such respondent was required to establish, maintain, and enforce a regulation or practice—

"whereby all cars distributed by such respondent to such
902 mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged."

The said order, by its terms, was to become effective September 1, 1923, but, by subsequent orders, the commission has postponed its effective date until March 1, 1925.

XX

The effect of said order, should it be made effective, would be to deny to your complainants in times of coal car shortage the right to use their cars for the transportation of their coal to their plants for their own consumption to such extent as such use might involve a greater car supply to the mines shipping the coal than the prevailing percentages of distribution of system cars. For example: In a period of fifty per cent car supply, the necessary effect of the said order will be that approximately fifty per cent of complainants' cars will be excluded from service and rendered idle not-

withstanding that complainants have coal ready to ship for the essential supply of their plants as aforesaid, notwithstanding the railroads are willing and ready to transport such shipments and have ample locomotive, labor, tracks, and other public facilities to move such shipments and all other traffic currently offering. And this result will be effective in periods when the country and its industries and citizens generally require all the coal that
863 can possibly be moved. There are approximately 30,000 privately owned coal cars now in service on the railroads of the United States, and the effect of the commission's order of June 13, 1923, if enforced, will be to exclude from use one-half of such cars, or approximately 15,000 cars, in periods of fifty per cent car supply, thus diminishing to that extent the number of vehicles available to serve the country's coal needs.

XXI

Upon application to said commission for rehearing in said matter, including application by your complainants, and upon and after such rehearing, the matter was so proceeded with that on December 23, 1924, the commission issued its report and order on said rehearing, which report is reported at 93 I. C. C. 701, and is hereby referred to and included by reference herein with the same effect as if here set out in extensio, and a true copy of said order is hereto annexed and hereby made part of this bill of complaint.

By said order it is ordered—

"That the order entered in this proceeding on June 13, 1923, be, and the same is hereby, further modified so as to become effective on March 1, 1925, instead of on January 15, 1925."

and by said order the order of June 13, 1923, therein referred to, is not otherwise modified.

XXII

Complainants are advised, believe, and aver that the railroad companies over whose lines complainants' cars move have been and continue to be wholly willing and able to handle such cars for the movement of complainants' shipments as in the past and are and have at all times herein mentioned been willing and able to handle private coal cars for all other shippers and receivers of coal desiring to supply them for such use without undue discrimination or
864 preference in favor of the owner thereof or undue prejudice to the interests of any other shippers or traffic.

XXIII

Said order of the commission, if enforced, will deprive complainants of the value of their cars and of the beneficial use thereof, and deprive them of their right as hereinbefore set out to have the same

accepted, used, and operated to transport complainants' coal over the lines of railroad aforesaid, particularly the lines thereof in the State of Pennsylvania. The use of said cars is not important or of value to complainants except during periods of coal car shortage, at which times their use will be denied under said order as set out in Paragraph XVII hereof.

The cars owned by complainants represent an investment of $6,300,000, of which a substantial part has been financed through the issue of car trust certificates sold to the public, and of which the value and security will be greatly impaired if the order of the commission goes into effect.

The amounts received by complainants from the railroads as mileage allowance upon their cars are much less than the cost of repairs and depreciation thereon, borne by complainants, who do and must also bear other expenses in connection therewith and return or interest upon the investment therein. They do not, therefore, have profit or full compensation in respect thereof, and the denial to them by said order of the commission of the opportunity to receive their needed supplies of coal by use of the cars in periods of coal car shortage will greatly impair the value of complainants' investment not only in said cars but in their plants, without any compensation to complainants.

XXIV

Said order of the commission also unjustly and unlawfully discriminates against complainants in that complainants' competitors in common markets are left free to have their privately owned
985 cars used and operated on railroads subject to the interstate commerce act and within the jurisdiction of the commission, including the railroads named in paragraph XIII hereof. Fuel oil, with which complainants' products compete, is transported in interstate commerce on said railroads almost exclusively in privately owned tank cars, without restriction as to placement and movement thereof by said railroads, and under the protection of the assigned car practice, which the order now denies to the cars of complainants. The same is true of anthracite coal, with which complainants' coke competes. In consequence thereof, your complainants are unduly discriminated against and unduly prejudiced by said order in such competitive markets in violation of the interstate commerce act.

XXV

Complainants further aver that said order of the commission, as appears by its said reports, is not made in respect of transportation or transportation conditions, or service, but upon grounds and for reasons and in an attempt to regulate and prescribe matters which are not within the power or jurisdiction of the commission and con-

cerning which it has no right to act. In particular, complainants aver that said order, while purporting to be a regulation of transportation in interstate commerce, directly affects and attempts to regulate intrastate commerce; is in fact founded upon an attempt to regulate and affect the business of mining bituminous coal, including the supply of labor therefor, and to regulate, equalize, and change commercial and business conditions in said industry not connected with transportation. Said order is therefore arbitrary, unreasonable, unlawful, and beyond the power of the commission.

XXVI

In so far as said order purports to be based upon reasons in
966 respect of the prevention of undue discrimination, preference and prejudice in the use of facilities of railroads other than coal cars, complainants aver that the record of evidence before the commission in said proceeding, Docket 12530, contains no evidence of any preference or discrimination in the transportation of complainants' cars, nor proof of a single instance in which locomotive, labor, track, or other public facilities of transportation have been devoted preferentially to the movement of said cars to the prejudice of the movement of coal in system cars or to the prejudice of any other traffic whatsoever.

Complainants are advised, believe, and therefore aver that, if there be at any place or at any time any such discrimination, preference or or prejudice arising from the use and operation of the private coal cars of any owner on any railroad, it is the duty of said commission, after hearing upon the particular case, to correct the same by a specific order or orders appropriate in the premises, and that it is beyond the power and jurisdiction of the commission to deny to complainants rights in respect of the operation and use of their cars by general order because of the possible existence of such violation or evasion of law for which complainants are not responsible and in which they are not concerned. In making the order here complained of, the commission has violated its duty in said respect, and the order is therefore arbitrary, unreasonable, unlawful, and beyond the power of the commission.

XXVII

Complainants are further advised, believe, and therefore aver that by paragraphs (10), (11), (12), and (13) of section 1 of the interstate commerce act as amended, particularly by the transportation act, 1920 (41 Statutes at Large 456), the commission is without power to make the order here complained of, and is without power to change the assigned car rule as set out in Paragraph XVII hereof (in respect of the right of complainants to have their coal cars placed

at the mine to which they are sent), as being the long estab-
967 lished and prevailing rule, approved by decisions of said commission and of the courts of the United States at the time said paragraphs were adopted and/or amended by Congress. The entire subject was considered by Congress in 1919 and 1920 prior to the passage of said transportation act. By said paragraphs Congress adopted as the statutory law the long-established rules (a) that, in determining the number of system cars to which a mine is entitled under percentage distribution, private cars placed thereat should not be ignored and must be counted as cars received, but only for that limited purpose, but (b) that all private cars assigned to the mine should be placed, notwithstanding shortage of system cars to other mines, so long only as the railroads had motive power, labor, and tracks, and other facilities available to do so, so that undue preference did not arise. Said order, denying the right to have the coal cars of complainants so placed in periods of coal-car shortage and consequently denying to complainants their legal right to have their own coal transported in their own cars to their own plants, is therefore unlawful and beyond the power and jurisdiction of the commission.

XXVIII

Complainants aver that the said order will, if enforced, deny and abolish their right to use their private cars in times of coal-car shortage, the extent of such denial and abolition being measured inversely by the prevailing percentage of distribution of the public or system cars, wherein the order is unlawful upon the following grounds:

(a) It constitutes a denial to complainants of a right existing at common law preserved by the interstate commerce act, and recognized and re-enacted by Congress, and is thus beyond the power of the commission.

(b) It constitutes a denial to complainants of a right under the laws of the Commonwealth of Pennsylvania to have their private cars transported on railroads subject to said laws, which right is preserved by the interstate commerce act and by the Consti-
968 tution of the United States, and said order is therefore beyond the power of the commission.

(c) Said denial of complainants' right is unsupported by any evidence that its exercise has resulted or will result in any undue preference of complainants' shipments and is not limited to circumstances in which undue prejudice may possibly arise in the future, but, on the contrary, is to be enforced at all periods of coal-car shortage without reference to surrounding circumstances or conditions and is therefore not supported by evidence and is unreasonable, arbitrary, and unlawful.

(d) Said order, together with the report made part thereof, while in form purporting to prescribe regulations for the distribution of coal cars among bituminous coal mines as a regulation of transportation by railroads in interstate commerce, is, in substance and intent,

an attempt on the part of the commission to regulate the bituminous coal mining industry by distributing coal production ratably among all mines desiring to operate and by preventing complainants and others from securing their coal where they desire, notwithstanding they are ready to supply their own cars for its movement, and for this reason the order is beyond the power of the commission and unreasonable, arbitrary, and unlawful.

(e) Said order and the report made part thereof will, if enforced, unlawfully deprive complainants of beneficial use of their private coal cars without compensation and will thus deprive them of their property without due process of law in violation of the Constitution of the United States.

XXIX

If said order shall be permitted to become effective, complainants will suffer great and irreparable injury, particularly as follows:

Through denial of the beneficial use of their private coal cars, which represent a total investment of more than 6 million dollars;

969 Through interruption, breakdown, and partial suspension of the operation of their coke ovens and other facilities;

Through inability to fill existing contracts for the production and sale of their products, with consequent liability to numerous large damage suits;

Through inability to continue to enter into contracts for the future manufacture and sale of products of their plants and consequent curtailment of the profitable prosecution of their business;

Through being forced into the open market in an attempt to secure from other mines than those contracted with by them and at inflated prices coal of unknown and varying quality and structure, with resulting excessive expense and damage to their plants, their processes, and their products.

Wherefore complainants and each of them pray—

(a) That a temporary or interlocutory order or injunction be entered restraining and enjoining, until further order of this court, the defendant, United States of America, and the defendant, Interstate Commerce Commission, from enforcing or applying said report and order issued June 13, 1923, and its further report and order of December 23, 1924.

(b) That this court adjudge, order, and decree that the report and order of the defendant, Interstate Commerce Commission, of June 13, 1923, and its further report and order of December 23, 1924, in so far as they prohibit the placement, loading, or transportation of privately owned coal cars at the mines designated by the owner in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal car shortage, are beyond the lawful authority of defendant, Interstate Commerce Commission, and are without warrant in law and null and void and that said reports and orders be set aside and annulled.

(c) That this court adjudge that said reports and orders of defendant, Interstate Commerce Commission, of June 13, 1923, and
970 December 23, 1924, in so far as they require the carriers to cease and desist from regulations and practices permitting the placement and loading of complainants' private cars at mines in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars, and or the subsequent transportation of complainants' coal in their said private cars, are beyond the lawful authority of defendant, Interstate Commerce Commission, and without warrant in law and null and void and that said reports and orders be set aside and annulled.

(d) That this court adjudge that the reports and orders of defendant, Interstate Commerce Commission, of June 13, 1923, and of December 23, 1924, in so far as they require the carriers to establish, maintain, and enforce regulations and practices whereby mines at which complainants' privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mines' pro rata share of the total number of available cars, are beyond the lawful authority of the Interstate Commerce Commission and without warrant in law and null and void and that said reports and orders be set aside and annulled.

(e) That this court adjudge, order, and decree that any regulations and practices affecting privately owned coal cars published by any carriers by railroad in conformity with said orders of June 13, 1923, and December 23, 1924, be and the same are in violation of the legal rights of your complainants, and each of them, and unlawfully restrict and deny their right to transportation service from such carriers, and are without warrant of law, and null and void.

(f) That defendant, United States of America, and defendant, Interstate Commerce Commission, and each of them be perpetually restrained and enjoined from restricting, in accordance with said reports and orders of the Interstate Commerce Commission, dated June 13, 1923, and December 23, 1924 or by or through any other report, order or decision, the full and exclusive use and en-
971 joyment of privately owned coal cars, and particularly such cars of your complainants.

(g) That your honorable court will grant unto your complainants a writ of subpœna directed to the defendants and each of them commanding them on a certain day therein to be specified to be and appear before your honorable court and then and there full, true and complete answer make to all and singular the premises and to perform and abide by such order and decree herein as your honorable court shall deem meet and agreeable to equity and good conscience.

(h) That your honorable court direct that due and proper notice of this bill of complaint be served forthwith on defendants herein and on each of them as in said district court jurisdiction act duly provided.

(i) That your complainants and each of them may have such other and further relief in the premises as to equity may appertain and as may be deemed by this honorable court fit and proper.

And your complainants as in duty bound will ever pray.

[SEAL.] RAINEY-WOOD COKE COMPANY,
By SCOTT STEWART, *Vice President.*

Attest:

H. R. ABREWS, *Secretary.*

[SEAL.] SEABOARD BY-PRODUCTS COKE COMPANY,
By C. J. RAMSBURG, *Vice President.*

Attest:

JNO. S. BROOKES, *Sec.*

972 [SEAL.] CHICAGO BY-PRODUCT COKE CORPORATION,
By C. J. RAMSBURG, *Vice President*

Attest:

JNO. S. BROOKES, *Sec.*

[SEAL.] DONNER HANNA COKE CORPORATION,
By W. H. DONNER, *Pres.*

Attest:

HUGH F. SMITH,
JOHN LORD O'BRIAN,
RALPH J. BAKER,
Counsel for Complainants.

973 [*Duly sworn to by Scott Stewart et al.; jurat omitted in printing.*]

974-977 *Exhibit to bill of complaint*

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of June, A. D. 1923

No. 12530

In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

The Algoma Central & Hudson Bay Railway Company, etc. (here follows the names of all steam railroad carriers subject to the Interstate Commerce Act), respondents.

It appearing, that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary;

It further appearing, that said order dated March 22, 1921, was served in the manner provided by law upon all carriers by railroad in the United States subject to the interstate commerce act, said

carriers being listed above and hereinafter referred to as respondents;

It further appearing, that a full investigation of the matters and things involved has been had with respect to carriers serving bituminous-coal mines, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

It further appearing, that no reason appears for the continuance of the investigation as to carriers serving solely anthracite-coal mines:

It is ordered, that each of the respondents be, and each is hereby, notified and required to cease and desist, on or before September 1, 1923, and thereafter to abstain, from maintaining and en-
978 forcing, in so far as such respondent maintains and enforces, a regulation or practice whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars, or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars.

It is further ordered, that each of the respondents which distributes cars to bituminous-coal mines located upon its line or customarily dependent upon it for car supply be, and each is hereby, notified and required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

It is further ordered, that the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, be, and it is hereby, discontinued.

And it is further ordered, that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

979 *Exhibit to bill of complaint*

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23d day of December, A. D. 1924

No. 12530

In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

It appearing, that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway fuel coal, with a view to prescribing such just and reasonable rules and regulations as might appear to be necessary:

It further appearing, that by order entered June 13, 1923, the commission entered its order requiring the respondents to change their practices with regard to the distribution of privately owned coal cars and cars placed for railway fuel coal so as to comply with the findings of the commission embodied in its report, filed herein, 80 I. C. C. 520;

It further appearing, that by order entered on October 5, 1923, the commission reopened the case for further hearing, and pending its report on said further hearing, the effective date of said order entered on June 13, 1923, has been postponed until January 15, 1925:

And it further appearing, that said further hearing has been had, and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

980 It is ordered, that the order entered in this proceeding on June 13, 1923, be, and the same is hereby, further modified so as to become effective on March 1, 1925, instead of on said January 15, 1925.

It is further ordered, that this order continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

981-982 In United States District Court

[Title omitted.]

Answer of the United States

Filed April 2, 1925

United States of America for answer to the bill of complaint filed herein against it says:

I. On information and belief, this defendant admits the facts alleged in Paragraph I in manner and form as alleged.

II, III, IV, V. Defendant has no knowledge of the matters and things alleged in Paragraphs II, III, IV, and V, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

VI, VII. On information and belief, defendant admits the allegations of Paragraphs VI and VII in manner and form as alleged.

VIII, IX, X, XI, XII, XIII, XIV, XV, XVI. Defendant has no knowledge of the matters and things alleged in Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, and XVI, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

XVII. Defendant has no knowledge of the matters and
983 things alleged in Paragraph XVII, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof, with these exceptions: (a) Defendant admits that the commission made and published the eight reports which are identified by the titles thereof; (b) defendant denies that under any interpretation the order of the commission is unlawful "and a taking of complainants' property in said cars without due process of law, contrary to the Constitution of the United States."

XVIII. Defendant has no knowledge of the matters and things alleged in Paragraph XVIII, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

XIX. On information and belief, defendant admits the facts alleged in Paragraph XIX in manner and form as alleged.

XX. Defendant has no knowledge of the matters and things alleged in Paragraph XX, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

XXI. On information and belief, defendant admits the facts alleged in Paragraph XXI in manner and form as alleged, with this exception: Defendant refers to the report and order of June 13, 1923 (80 I. C. C. R. 520) and the report and order of December 23, 1924 (93 I. C. C. R. 701) as to whether the latter modified the former

in any particular other than to postpone the effective date thereof from January 15, 1925, to March 1, 1925.

XXII, XXIII. Defendant has no knowledge of the matters and things alleged in Paragraphs XXII and XXIII, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

XXIV. Defendant denies the matters and things alleged in Paragraph XXIV and each and every part of the same in manner
984 and form as alleged and all of the inferences sought to be created thereby.

XXV. Defendant denies the matters and things alleged in Paragraph XXV and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XXVI. Defendant denies the matters and things alleged in Paragraph XXVI and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XXVII. Defendant denies the matters and things alleged in Paragraph XXVII and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XXVIII. Defendant denies the matters and things alleged in Paragraph XXVIII and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

XXIX. Defendant denies the matters and things alleged in Paragraph XXIX and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

Further answering, this defendant alleges that the matters and things set forth in the bill of complaint and sought to be put in issue before the court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the interstate commerce act; in its reports in writing with respect thereto, made after full hearing and on due notice to all of the parties, which state its conclusions together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the commission of which the parties were advised.

Defendant alleges that the facts set forth in the reports of the commission and each and all of the same are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the bill of complaint, or any
985 part of the same, which are inconsistent with any fact or facts found by the commission.

(c) Any and all inferences of fact from any particular fact or facts alleged in the bill of complaint, or any part of the same, which

seek to deny, or which are inconsistent with any fact or facts found by the commission.

(d) Any fact or facts alleged in the bill of complaint, or any part of the same, which set up, or which seek to set up, matters and things which were not before the commission.

(e) Any fact or facts alleged in the bill of complaint, or any part of the same, which attack or which seek to attack the action of the commission, and to show facts other than what the commission has found and declared.

(f) Any allegations in the bill of complaint, or any part of the same, which allege that facts were found by the commission in its reports and orders which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the bill of complaint, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

(h) Each and every allegation in the bill of complaint contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the bill of complaint be dismissed at the cost of the complainants and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
GEORGE W. COLES,
United States Attorney.

986 [*Duly sworn to by Blackburn Esterline; jurat omitted in printing.*]

987–988 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Mar. 27, 1925

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering Paragraphs I to VII, inclusive, of the bill of complaint, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

989 II

Answering Paragraphs VIII to XXIX, inclusive, of the bill of complaint, the commission admits and alleges that by an order dated March 22, 1921, which order is referred to in Paragraph XIX, the commission instituted a proceeding and an investigation on its own motion into and concerning the reasonableness and propriety of car-distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act, including the carriers referred to in said Paragraph XIII, were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further admits and alleges that it made and entered, and served upon all the respondents in said proceeding, the report and order of June 13, 1923, which is referred to in said Paragraph XIX.

The commission further admits and alleges that subsequent
990 to the issuance of said report and order of June 13, 1923, applications for rehearing in said proceeding, including application by complainants herein, were made to the commission, and that the effective date of said order of June 13, 1923, was by subsequent orders of the commission postponed until March 1, 1925.

The commission further admits and alleges that it made and entered, and served upon all the respondents in said proceedings, its supplemental report and order of December 23, 1924, which is referred to in said Paragraph XXI.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testimony and evidence submitted on behalf of complainants herein, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, including briefs and oral argument in behalf of complainants herein, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding, said report and order of June 13, 1923, and said supplemental

report and order of December 23, 1924, which included the
991 commission's decisions, conclusions, orders, and requirements in the premises.

The commission further alleges that, in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, by their respective counsel, and all matters called to its attention by complainants herein.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an un-
992 reasonable manner; and the commission denies each of and all the allegations to the contrary contained in said bill of complaint.

In particular the commission denies that irreparable injury or legal injury of any kind will result to complainants or any of them if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by complainants.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said bill of complaint, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

993 [*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

994-995 In United States District Court

[Title omitted.]

Petition of the Central Pennsylvania Coal Producers' Association for leave to intervene

Filed May 20, 1925

To the Honorable Judges of said court:

996 Respectfully comes the petitioner, the Central Pennsylvania Coal Producers' Association and represents that it has a substantial interest in the matters in controversy in the above-entitled proceeding, and desires to intervene as a party thereto, and to be represented therein by its counsel, and for grounds of the proposed intervention, says:

I

The Central Pennsylvania Coal Producers' Association is a voluntary unincorporated association of coal operators producing bituminous coal in the Clearfield or Central Pennsylvania district, in the State of Pennsylvania, with its principal office in the city of Altoona, Pennsylvania.

II

That its constituent members are corporations, partnerships, and individuals engaged in producing bituminous coal in the aforesaid district in the State of Pennsylvania; that they ship the same in interstate commerce; that their names, the location of their mines by railroad and the location of their general offices are shown in the table hereto attached, marked "Exhibit A," which is made a part hereof.

That the corporations, partnerships, and individuals who are members of this petitioner produce annually in said Clearfield or Central Pennsylvania district in the State of Pennsylvania, approximately thirty million tons of bituminous coal, a large proportion of which moves in interstate commerce.

997

III

That in the proceeding before the commission entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, in re Distribution among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," petitioner actively participated both upon the original hearing and upon rehearing, offered testimony, submitted briefs, and at oral argument was heard by counsel.

IV

That the position of this petitioner was in opposition to the preferential distribution of coal cars at bituminous coal mines and in opposition to the proposed rules of coal-car distribution contended for by carriers by railroad, and by owners and users of privately owned coal cars.

V

That the conclusions ultimately reached by the Interstate Commerce Commission, as well as those adopted by it following the original hearing in the proceeding, were in consonance with the views held by petitioner and contended for by it.

VI

Petitioner respectfully represents that the orders of the Interstate Commerce Commission made in said proceeding, Docket No. 12539, as of June 13, 1923, and December 23, 1924, and reported at 80 I. C. C. 539 et seq. and 93 I. C. C. 701 et seq. are legal and valid and not in derogation of any legal right of the petitioners in this case.

998

VII

That the Interstate Commerce Commission has appeared and intervened in this case as a party defendant; and the United States of America and Interstate Commerce Commission have filed answers to the petition of the petitioners therein.

VIII

That this petitioner for intervention, in so far as may be applicable, pertinent, appropriate, and permissible, hereby adopts the allegations, averments, and denials contained in the answers of United States of America and Interstate Commerce Commission, with like force and effect as if said allegations, averments, and denials were set forth in extenso herein.

Wherefore, petitioner prays—

(a) That leave be granted to it to intervene in and be treated as a party hereto, with the right to have notice of and to appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and to be heard in person or by counsel upon brief and at the oral argument.

(b) That due and proper service of this petition for intervention be forthwith made in the manner prescribed and provided in the district court jurisdiction act.

(c) That this honorable court make such other orders in
999 respect of this petitioner's position upon the record and other procedural matters, as may be appropriate.

(d) That the petition of the original petitioners in this case be dismissed at their cost.

And your petitioner will ever pray, etc.

THE CENTRAL PENNSYLVANIA COAL PRODUCERS' ASSOCIATION,
By A. M. LIVERIGHT,
Solicitor for Petitioner.

H. W. MOORE,
Of Counsel.

1000 [Duly sworn to by CHARLES O'NEILL; jurat omitted in printing.]

1001–1007 [Exhibit A to petition omitted. See Exhibit A, printed side page 884 ante.]

1008–1009 In United States District Court

No. 3275

[Title omitted.]

Petition of Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation, for leave to intervene

Filed May 21, 1925

To the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, sitting in equity:

Come now the Pocahontas Operators' Association, the Empire Coal & Coke Company, and the Pocahontas Fuel Company, Incorporated, and respectfully represent that the petitioners, and each of them, have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and to become parties to said proceeding, and for grounds of the proposed intervention say:

The petitioner, Pocahontas Operators' Association is an
1010 unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized, and doing business under the laws of the State of West Virginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia; said association being organized for the purpose of doing the work ordinarily done by trade associations in connection with preserving and promoting the general interests of its members.

The petitioner, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

The petitioner, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

All of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia.

The principal offices of the petitioners are as follows: Pocahontas Operators' Association, Bluefield, W. Va.; Empire Coal & Coke Company, Landegaff, W. Va.; Pocahontas Fuel Company, Incorporated, Boissevain, Va.

Petitioners file this petition in their own behalf, and also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracticable
1011 to bring them all before the court, and these petitioners file this petition on behalf of the whole.

Petitioners, and those on whose behalf this petition is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these petitioners. Petitioners are therefore interested in the general question to be determined in this case.

Pocahontas Operators' Association, on behalf of all of its members, including said other petitioners herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, in re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief and presented oral argument before the commission against the contentions of the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute pri-

vately owned cars in the way and manner claimed to be their
1012 right in the bill herein. These petitioners are therefore proper parties defendant in this suit.

Wherefore, these petitioners pray:

(a) That leave be granted them to intervene and to be treated as parties defendant herein, and that leave be granted them to file an answer to the bill herein, with the right to have notice of and appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and be heard in person or by counsel upon brief and in oral argument.

(b) That this court order that due and proper service of this petition be forthwith made, by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice, as in the district court jurisdiction set provided, and by serving a copy hereof upon each of the complainants herein.

And your petitioners as in duty bound will ever pray, etc.

GREEVER & GILLESPIE,
Solicitors for Petitioners.

E. L. GREEVER,
Of Counsel.
MAY, 1925.
J. F. BULLITT.

1013 [*Duly sworn to by Wm. C. Atwater, et al.; jurats omitted in printing.*]

1014–1017 In United States District Court

No. 3275

[Title omitted.]

Answer of the Pocahontas Operators' Association, Empire Coal & Coke Company, a Corporation, and Pocahontas Fuel Company, Incorporated, a Corporation

These defendants, Pocahontas Operators' Association, Em-
1018 pire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, having been made parties defendant herein by order of court, for answer to the bill of complaint filed herein, say:

I

That the defendant, Pocahontas Operators' Association, is an unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized, and doing business under the laws of the State of West Vir-

ginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia; said association being organized for the purpose of doing the work ordinarily done by trade associations in connection with preserving and promoting the general interests of its members.

That the defendant, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

That the defendant, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

That all of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia.

That the principal offices of these defendants are as follows:
1019 Pocahontas Operators' Association, Bluefield, W. Va.; Empire Coal & Coke Company, Landgraff, W. Va.; Pocahontas Fuel Company, Incorporated, Boissevain, Va.

That the defendants file this answer in their own behalf, and also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracticable to bring them all before the court, and these defendants file this answer on behalf of the whole.

That the defendants, and those on whose behalf this answer is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these defendants. Defendants are therefore interested in the general question to be determined in this case.

That Pocahontas Operators' Association, on behalf of all of its members, including said other defendants herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned

Cars for Bituminous Coal Mines, Docket No. 12530, in re Distribution Among Coal Mines of Privately Owned Cars and Cars
1020 for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief and presented oral argument before the commission against the contentions of the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and manner claimed to be their right in the bill herein.

II

That on information and belief, these defendants admit the facts alleged in Paragraphs I to VI, both inclusive, of the bill of complaint.

III

That these defendants are without knowledge as to the truth or falsity of the allegations contained in Paragraphs VIII to X, both inclusive, of the bill of complaint, except that they admit that all of the railroad companies therein named were parties respondent in the proceedings before the Interstate Commerce Commission, designated "Assigned Cars for Bituminous Coal Mines, Docket 12530"; but however this may be, they aver that all of the other allegations in said paragraph are immaterial.

IV

That these defendants are without knowledge as to the truth or falsity of the allegations of fact contained in Paragraph XIV of the bill of complaint, but aver the fact to be that the same are wholly irrelevant and immaterial, in that the character of complainants' business, their methods of doing business, and considerations of economy in doing said business, constitute no justi-
1021 fication for the distribution of coal cars in any manner which will give to complainants undue preference or work undue prejudice against other shippers.

V

That these defendants are without knowledge as to the truth or falsity of the allegations contained in Paragraph XV of the bill of complaint.

VI

That these defendants are without knowledge as to whether it is true as alleged in Paragraph XVI of the bill of complaint, that "in times of normal and regular markets for bituminous coal, and except when the lines of the railroad are affected by extraordinary conditions, such as strikes, the railroad transporting complainants'

coal can transport the necessary and constant supply thereof to complainants' plants in carrier-owned cars (hereinafter referred to as 'system cars') and without the use of privately owned coal cars of the complainants," but aver and charge that all the other allegations of said Paragraph XVI of the bill of complaint are irrelevant and immaterial.

VII

That these defendants are without knowledge as to how or why complainants' cars were acquired, or how they have been used, but admit that the so-called "assigned car rule" is correctly summarized in said Paragraph XVII of the bill of complaint. Defendants further admit that the order of the commission complained of in the bill of complaint is correctly construed in said Paragraph
1022 XVII of the bill of complaint, except that the commission has held in said order that complainants' privately owned cars cannot be placed at the mines or transported by the railroads in excess of the pro rata share of cars to which such mine or mines are entitled without thereby creating undue preference to the owners of such mines and undue prejudice against the owners of other mines, and so, defendants aver, that it is immaterial whether any part of complainants' cars would remian idle and unplaced as alleged in the bill of complaint, and defendants deny that any construction of said order of the commission would result in "a taking of complainants' property in said cars without due process of law, contrary to the Constitution of the United States."

VIII

That these defendants deny all the allegations contained in Paragraph XVIII of the bill of complaint.

IX

That these defendants admit the allegations contained in Paragraph XIX of the bill of complaint.

X

That these defendants admit that it is true as alleged in Paragraph XX of the bill of complaint, that the effect of the order of the commission "would be to deny to complainants in times of coal-car shortage the right to use their cars for the transportation of their coal to their plants for their own consumption to such extent as such use might involve a greater supply to the mines shipping their coal
than the prevailing percentage of distribution of system cars,"
1023 but aver and charge that said result does not make unlawful the said order of the commission complained of in the bill of complaint, and it is immaterial whether or not, as alleged in the

bill, "approximately 50 per cent of complainants' cars would be excluded from service and rendered idle" by said order, for the commission has rightfully held that any other method of using complainants' cars would be unlawful, in that such other use would be unduly preferential to complainants and unduly discriminatory to others.

Defendants are without knowledge as to the allegations in said last mentioned paragraph of the bill of complaint as to the number of privately owned cars now in service in the United States, or as to the effect of the commission's order on their use, but aver that it is immaterial what that effect may be.

XI

That these defendants admit the allegations in Paragraph XXI of the bill of complaint.

XII

That these defendants deny the allegations contained in Paragraph XXII of the bill of complaint.

XIII

That these defendants deny that it is true as alleged in Paragraph XXIII of the bill of complaint, that "said order of the commission, if enforced, will deprive the complainants of the value of their cars and of the beneficial use thereof."

Defendants are without knowledge as to whether or not it
1024 is true as alleged in said Paragraph XXIII of the bill of complaint that "the cars owned by complainants represent an investment of $6,300,000, of which a substantial part has been financed through the issue of car trust certificates sold to the public, and of which the value and security will be greatly impaired if the order of the commission goes into effect," but aver that said allegation is immaterial.

Defendants admit that it is true, as alleged in said Paragraph XXIII of the bill of complaint, that "the amounts received by complainants from the railroads as mileage allowances upon their cars are much less than the cost of repairs and depreciation thereon borne by the complainants, who do and must also bear other expenses in connection therewith, and of interest upon the investment therein; they do not therefore have profit or just compensation in respect thereof"; and defendants aver that all other allegations contained in said Paragraph XXIII of the bill of complaint are immaterial.

XIV

That these defendants deny all the allegations contained in Paragraphs XXIV, XXV, and XXVI of the bill of complaint, and all conclusions and inferences drawn therefrom, but aver that the same are immaterial.

XV

That these defendants deny all the allegations contained in Paragraph XXVII of the bill of complaint, and all inferences and conclusions drawn therefrom, and deny the correctness of the construction therein placed upon the Interstate Commerce Act, the decisions of the commission, and of the courts of the United States therein referred to.

1025

XVI

That these defendants deny that the said order of the commission will deny and abolish any lawful right of the complainants to the use of their private cars, as alleged in Paragraph XXVIII of the bill, and that the said order is unlawful upon the grounds therein stated, or upon any other grounds.

XVII

That these defendants deny that it is true, as alleged in Paragraph XXIX of the bill of complaint, that "if said order shall be permitted to become effective, complainants will suffer great and irreparable injury" either in the manner therein set out, or in any other way, but they are advised and so aver that the fact, if it be a fact, that said order of the commission will cause loss or damage to the complainants, does not render said order invalid or unlawful, and that the undue preference to the complainants and the undue prejudice to other shippers, found by the commission to exist prior to the entering of said order, fully justifies the commission in entering said order, and the complainants can not plead the loss of the benefits accruing to them on account of such undue preference and prejudice as a reason for declaring said order of the commission unlawful.

XVIII

That the defendants further deny that the plaintiffs are entitled to the relief prayed for in the bill of complaint, or to any part thereof.

1026

XIX

That the defendants here adopt, and ask to be read as a part hereof, as if herein set set out in extenso, Paragraph II of the answer of the Interstate Commerce Commission filed to the bill of complaint herein.

XX

Defendants further say that the use of privately owned cars in the manner alleged in the bill of complaint to be lawful, would result, as found and held by the commission, in undue preference and discrimination in favor of the mines to which they would be assigned, and in undue prejudice and damage to all other mines, which would result in the driving out of the business of mining and shipping coal of all mine owners not able or not willing to invest

in cars for their own use. This preferential use of such cars is condemned by the commission in the reports and orders complained of, after considering full and complete evidence on the subject, and defendants are advised and aver that said reports and orders are plainly right and within the statutory powers of the commission.

The defendants further say that the use of privately owned cars alleged in the bill of complaint to be lawful, results in the taking of private property and property rights for the benefit of private interests, which finds no justification under the law under any conditions.

The commission might lawfully have held, in the exercise of its discretion and within its statutory powers, that the moment the private owner of a car parts with its possession for hire to the railroad company it becomes a part of the equipment of the railroad company and must be devoted, under the law, to the public service. Privately owned cars, in the use of railroad companies,
1027 are governed by all the laws regulating interstate commerce, and are under the authority and control of the Interstate Commerce Commission.

This principle has long been recognized by the Interstate Commerce Commission to the extent of exercising control over the operations of privately owned cars, and to the extent of requiring that they be counted as part of the total supply of cars, and the statute gives the commission the power to fix the compensation to be paid by the carriers for their use.

In the orders of the commission under investigation in this case, the commission has declared that the mines served by the privately owned cars shall not receive from time to time more cars than their pro rata shares when compared with other mines, holding that any other practice is unduly discriminatory and preferential, and defendants are advised and aver that the commission might, in the exercise of its statutory discretion, have further held that in fact all coal cars for the use of which the railroad company pays must be counted, treated, and used in all respects as system cars.

Defendants further aver the facts to be in this case, as shown by the evidence introduced before the commission by the owners of said private cars, and admitted in the bill of complaint, that the railroad companies do not pay for the use of the privately owned cars in evidence before the commission an adequate compensation, but that they pay amounts barely sufficient to keep up repairs on the cars. These amounts do not provide for depreciation or for return on invested capital, and therefore the owners of said private cars in fact pay a bonus to the railroad companies, in the form of furnishing invested capital free of charge, for which they receive in return the privilege of using the railroad companies' motive power, road, and terminal facilities, and administrative services, to a greater extent than
1028 can be used by other. While they nominally pay the same freight rates on their coal as are paid by others, they in fact pay a higher rate, for which they receive a different and better serv-

ice, and, therefore, the owners of private cars operate under special contracts with the carriers, from the benefits of which the general public is excluded because of lack of money or unwillingness to furnish the equipment necessary to give them such special and better service.

Defendants further say that they are advised and so aver the fact to be that any greater or better service afforded by the railroads to one or more mines than is furnished to other mines is unduly and unlawfully preferential and discriminatory, no matter for what reason it is given, and that all the allegations contained in the bill of complaint seeking to justify such practice are irrelevant and immaterial.

The complainants declare that by reason of their ownership of private cars they are entitled to have greater and better service from the railroad companies than said railroad companies can render to other shippers of coal, and declare that the said reports and orders of the commission deprive them of that greater and better service. Defendants are advised and so aver and charge that the law is that railroads shall furnish equal service to all, and this contemplates the fact of equal treatment under any and all circumstances, and it is contrary to the spirit of the law that any shipper may obtain a preferential service over other shippers under any conditions.

Wherefore, having fully answered defendants pray that the bill of complaint be dismissed in this cause, and for such other and further order as may be proper.

In testimony whereof, the defendant, Pocahontas Operators' Association, has caused its name to be signed hereto by its president, and defendant, Empire Coal & Coke Company, has caused its name to be signed hereto by its president, with its corporate seal affixed, attested by its secretary, and defendant, Pocahontas Fuel
1029– Company, incorporated, has caused its name to be signed
1032 hereto by its vice president, with its corporate seal affixed, attested by its secretary.

POCAHONTAS OPERATORS' ASSOCIATION,
By ——— ———, *President.*
EMPIRE COAL & COKE COMPANY,
By ——— ———, *President.*

Attest:

——— ———, *Secretary.*

POCAHONTAS FUEL COMPANY, INCORPORATED,
By ——— ———, *Vice President.*

Attest:

——— ———, *Secretary.*

GREEVER & GILLESPIE,
Counsel for Defendants.

F. L. GREEVER,
Of Counsel.

1053 **In United States District Court**

No. 3275

[Title omitted.]

Amendment to answer

Filed May 27, 1925

For the purposes of this suit the counsel for the United States admits the allegations of fact contained in Paragraphs II, III, IV, and V of the bill of complaint.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

By their respective counsel, the defendants, United States and Interstate Commerce Commission concede:

(a) The Rainey-Wood Coke Company owns 400 coal cars; Seaboard By-Product Coke Company and Chicago By-Product Coke Company own 1,000 coal cars; and Donner-Hanna Coke Corporation owns 500 coal cars; and such cars are of substantial value.

(b) The railroad carriers over whose lines the cars of complainants move have been and are willing to handle them.

(c) The court and counsel may refer to the acts of the General Assembly of the Commonwealth of Pennsylvania, referred to in Paragraph XVIII of the bill of complaint, as fully and completely as if certified copies of the acts, and each of them, were duly offered and received in evidence.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1054 **In United States District Court**

Statement re opinion

For the opinion of the court filed November 25, 1925, see record in the case of United States of America, defendant, and Interstate Commerce Commission, intervening defendant, vs. the Akron, Canton & Youngstown Railway Company et al.

1035 **In United States District Court**

No. 3275

[Title omitted.]

Final decree

Filed December 15, 1925

This cause came on to be heard at this term, on petition, answers, and evidence submitted, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the order of the Interstate Commerce Commission in the case entitled "Assigned Cars for Bituminous Coal Mines" (In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel), No. 12530, entered at a general session of the commission at its office in Washington, D. C., on June 13, 1923, as affirmed by its further order of December 23, 1924, be, and the same is hereby, set aside, annulled, and suspended.

2. That a permanent injunction be, and the same is hereby, granted and issued out of this court as prayed in the bill of complaint, and the defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be, and they are hereby, permanently restrained and enjoined from enforcing, or in any manner attempting to enforce or carry out, the said order or any of the terms thereof.

By the court:

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. WHITAKER THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1036 **In United States District Court**

No. 3275

[Title omitted.]

Petition for appeal by United States and Interstate Commerce Commission

Filed February 6, 1926

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the District Court made and entered December fifteenth, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1037 In United States District Court

No. 3275

[Title omitted.]

Assignments of error of the United States and Interstate Commerce Commission

Filed February 6, 1926

United States of America and Interstate Commerce Commission, defendants, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December fifteenth, 1925.

The District Court erred:

I. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

II. In not dismissing the bill of complaint for want of equity.

III. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

IV. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

V. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft-
1038 coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

VI. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

VII. In holding "that the use of the railway-fuel cars and private cars under the assigned-car rule is not per se preferential."

VIII. In holding "that there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

IX. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

X. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

XI. In holding that the "valuable legal right in the ownership of private cars * * * furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage."

XII. In holding that the compensation to the owners for the use by railroads of private cars has been fixed by the commission at one and one-half cents per mile.

XIII. In holding to be untenable the commissioner's finding that an increase pro rata allotment at unassigned-car mines will result if the assigned-car rule is abolished.

1089 XIV. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

XV. In holding that "the right to the use of private cars" is not subordinate to the power of Congress and of the commission to regulate interstate commerce.

XVI. In failing to discriminate between the legal title of the complainants in and to the cars, and the use of the cars in interstate commerce over which the commission has full control.

XVII. In holding that the railroads cannot reasonably secure an adequate supply of fuel under the order of the commission, and that, therefore, the present method of obtaining railroad fuel by the use of assigned cars is justified, although the general public is thus served at the expense of other shippers and consumers of coal.

XVIII. In holding that the commission in prescribing reasonable and nonpreferential rules of car distribution cannot treat upon the same basis as the other coal cars which the carrier owns or uses, cars owned by private shippers and used by the carrier.

XIX. In ignoring the primary duty of the carriers under the interstate commerce act at all times to furnish transportation, including an adequate supply of cars.

XX. In not overruling the claim of coal shippers to the right in times of car shortage to the exclusive and preferential use of coal cars owned by them in possession of, operated, and otherwise treated by the several carriers as a part of their general operation and equipment.

XXI. In holding that rentals paid by carriers to the owners of private coal cars must be considered in determining rules by which carriers are to be governed in distributing coal cars.

XXII. In failing to give full force and effect to paragraph (11), (12), (13), (14), and (15) of section 1 of the interstate commerce act.

1040 XXIII. In holding that the commission "has misconceived the purpose of paragraph (15) of section 1" of the interstate commerce act.

XXIV. (Error assigned by the United States only.) In failing to give full force and effect to paragraph (12) of section 1 of the interstate commerce act, and in holding "We find it, however, unnecessary to base our conclusions in the case upon the construction of paragraph (12) of section 1, although its legislative history in connection with the administrative history of the assigned-car rule has a bearing upon the question of the reasonableness of the order of the commission which is before us."

Wherefore defendants, and each of them, pray that the final order or decree of the District Court, entered December fifteenth, 1925, be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill of complaint dismissed; and for such other and further order as may be appropriate.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1041 In United States District Court

No. 3275

[Title omitted.]

Order allowing appeal of United States and Interstate Commerce Commission

Filed Feb. 8, 1926

In the above-entitled cause, United States of America and Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December fifteenth, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which the said order or decree was made and entered to the Supreme Court of the United States.

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1042 In United States District Court

No. 3275

[Title omitted.]

Precipe for transcript of record

Filed Feb. 17, 1926

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill of complaint.
2. Exhibits to the bill of complaint.
3. Answer of the United States.
4. Intervention of Interstate Commerce Commission and its counsel.
5. Answer of Interstate Commerce Commission.
6. Intervening petition of the Central Pennsylvania Coal Producers' Association.
7. Intervening petition of Pocahontas Operators' Association et al.
8. Answer of Pocahontas Operators' Association et al.
9. The following certified copies of reports and orders of the commission, viz:

Exhibit No. 15, No. 13886, In re Rules Governing Ratings of Coal Mines, etc., December 23, 1924, 95 I. C. C. 369, 384, report.

Exhibit No. 14, No. 12530, Assigned Cars for Bituminous Coal Mines, December 23, 1924, 93 I. C. C. 701, 754, report and order.

1043 Exhibit No. 13, No. 12530, Assigned Cars for Bituminous Coal Mines, June 13, 1923, 80 I. C. C. 530, 589, report and order.

Exhibit No. 12, In re Assignment of Freight Cars, June 11, 1920, 57 I. C. C. 769-772, report and order.

Exhibit No. 11, No. 4986, In re Private Cars, July 31, 1918, 50 I. C. C. 652-718, report and order.

Exhibit No. 10, No. 9284, Car Supply Investigation, January 18, 1917, 42 I. C. C. 657, 706, report and order.

Exhibit No. 9, No. 1383, Hillsdale Coal & Coke Co. v. Pennsylvania Railroad, March 7, 1910, 19 I. C. C. 356, report and order.

Exhibit No. 8, No. 1322, Rail & River Coal Co. v. Baltimore & Ohio, June 2, 1908, 14 I. C. C. 86, 87–97, report and order.

Exhibit No. 7, No. 1305, No. 1306, No. 1307, Royal Coal & Coke Co. v. Southern Railway Co., April 13, 1908, 13 I. C. C. 440, 441, 450, report and order.

Exhibit No. 6, No. 1294, 1295, 1317, Tracy v. Chicago & Alton (2 other cases), April 13, 1908, 13 I. C. C. 451, 459, report and order.

Exhibit No. 5, No. 1033, Ruttle v. Pere Marquette, March 2, 1908, 13 I. C. C. 179, 186, report.

Exhibit No. 4, No. 1008, Railroad Commission of Ohio v. Hocking Valley, July 11, 1907, 12 I. C. C. 476, 480, report.

Exhibit No. 3, orders in No. 12530 of date, respectively, July 25, 1923, September 12, 1923, October 9, 1923, November 6, 1923, December 14, 1923, December 19, 1923, March 3, 1924, May 6, 1924, June 30, 1924, October 22, 1924, December 9, 1924 (or in lieu thereof any narrative agreed upon by the parties and or approved by the Court).

Exhibit No. 2, which consists of (a) order in No. 12530, March 22, 1921, one mimeograph page; (b) order in No. 13896, June 17, 1922, one page with 6 pages of rules attached (Exhibit A, 5½ pages, and Exhibit B, ½ page) (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

10. Exhibit No. 1, certified copy of the transcript of the record of the evidence and proceedings before the Interstate Commerce Commission offered by the counsel for the petitioners (or in lieu thereof any narrative agreed upon by the parties and or approved by the court).

11. Certified copies of the following annual reports of the commission (or in lieu thereof any narrative agreed upon by the parties and or approved by the court):

1644 Exhibit No. 16, 21st, 1907; December 23, 1907.
Exhibit No. 17, 34th, 1920; December 1, 1920.
Exhibit No. 18, 35th, 1921; December 1, 1921.
Exhibit No. 19, 36th, 1922; December 1, 1922.
Exhibit No. 20, 37th, 1923; December 1, 1923.
Exhibit No. 21, 38th, 1924; December 1, 1924.

12. Stipulation of counsel for the United States that certain allegations contained in the bill of complaint are true.
13. Order of final submission.
14. Opinion of the District Court.
15. Final decree.
16. All journal entries in their appropriate order.
17. Petition for appeal.
18. Assignment of errors.
19. Order allowing appeal.
20. Praecipe for record.

21. Summons and severance (two).
22. Notice to the Attorney General of Pennsylvania.
23. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

Service of the foregoing praecipe for record and the receipt of a copy thereof are hereby admitted and acknowledged this 13th day of February, 1926.

HUGH F. SMITH,
JOHN LORD O'BRIEN,
RALPH J. BAKER,
Solicitor for Appellees.

1945 In United States District Court

No. 327

[Title omitted.]

Summons and severance

Filed Feb. 10, 1926

To Pocahontas Operators' Association, an unincorporated voluntary association; Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are intervenors.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 8th day of February, 1926.

E. L. GREEVER,
Solicitor for the Foregoing Intervenors.

1046 In United States District Court

No. 327o

Summons and severance

Filed Feb. 18, 1926

To the Central Pennsylvania Coal Producers' Association, a voluntary unincorporated association:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the District Court entered December 15, 1925, in the above-entitled cause in which you are intervener.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the District Court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURREY,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 11th day of February, 1926.

A. M. LIVERIGHT,
Solicitor for the Central Pennsylvania Coal Producers' Association.

1047 In United States District Court

No. 3275

Notice of appeal

Filed Feb. 11, 1926

To the honorable GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

You are hereby notified that the defendants, United States of America and Interstate Commerce Commission, have taken an appeal from the final order or decree of the District Court entered December

15, 1925, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURREY,
Solicitor for the Commission.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of February, 1926.

GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

1048 [Citation in usual form showing service on Hugh. F. Smith et al., filed Feb. 25, 1926, omitted in printing.]

1049 [Clerk's certificate to foregoing transcript omitted in printing.]

1050 [Caption omitted.]

1051–1052 In United States District Court for the Eastern District of Pennsylvania

3317. March term, 1925

Public Service Electric and Gas Company, plaintiff (Henry S. Drinker, Esq.), vs. United States of America, Interstate Commerce Commission, defendant (George W. Coles, Esq.), and Pocahontas Operators' Association et al.

Docket entries

April 17, 1925. Bill of complaint filed.
17, Subpœna exit, returnable May 7, 1925.
28, Subpœna returned on April 20 served as to United States, and on April 21 served as to Interstate Commerce Commission and filed.
May 7, 1925. Answer to United States filed.
7, Answer of Interstate Commerce Commission filed.
21, Petition of Pocahontas Operators' Association, Empire Coal & Coke Company, and Pocahontas Fuel Company, Inc., for leave to intervene filed.
25, Argued.
26, Hearing continued.
27, Admission by defendants as to certain evidence filed.
28, Hearing continued.
29, Hearing concluded.

Nov. 25, 1925. Opinion, Thompson, J., setting aside and annulling and suspending enforcement of order of Interstate Commerce Commission, filed.
Dec. 15, 1925. Final decree filed.
Feb. 6, 1926. Defendant's assignments of error filed.
Feb. 6, 1926. Defendant's petition for appeal filed.
" 8, " Assignment of error by intervening defendants (Pocahontas Operators' Association, Empire Coal & Coke Co., Pocahontas Fuel Co., Inc.) filed.
" 8, " Decree granting appeal of defendants filed.
" 8, " Petition for appeal by intervening defendants (Pocahontas Operators' Assn., Empire Coal & Coke Co., & Pocahontas Fuel Co., Inc.) filed.
" 9, " Acceptance of service by attorney general of Penna. of notice of appeal filed.
" 9, " Order of court granting prayer of petition for appeal of intervening defendants filed.
" 9, " Citation on behalf of intervening defendants exit.
" 10, " Summons and severance by defendants to intervening defendants filed.
" 11, " Notice of appeal by defendants and acknowledgment of service thereof filed.
" 13, " Citation by United States and Interstate Commerce Commission returned, service admitted, and filed.
" 16, " Praecipe as to transcript of record sur appeal filed.
" 25, " Citation on behalf of intervening defendants returned, service accepted, and filed.
Mar. 5, 1926. Decree extending time in which to complete appeal filed.
May 10, 1926. Certified copy of decree extending time to July 9, 1926, in which to file record in Supreme Court filed.
July 7, 1926. Decree extending time to September 1, 1926, in which to file record in Supreme Court filed.
Sept. 1, 1926. Cert. copy of decree enlarging time in which to file record in Supreme Court filed.
" 24, " . Stipulation of counsel as to transcript of testimony of Dudley Farrand and decree approving stipulation filed.
" 24, " . Testimony of Dudley Farrand filed.
Oct. 2, 1926. Cert. copy of decree extending time to November 1, 1926, in which to file record in U. S. Supreme Court filed.
" 19, " . Stipulation of counsel as to transcript of testimony in narrative form filed.
" 19, " . Narrative statement of testimony filed.

1053 **In United States District Court**

[Title omitted.]

Bill for injunction

Filed April 27, 1925

To the Honorable the Judges of the District Court of the United States in and for the Eastern District of Pennsylvania, sitting in equity:

Public Service Electric and Gas Company, a corporation of the State of New Jersey, having its principal office at No. 80 Park Place, in the city of Newark, New Jersey, a citizen of said State, brings its bill of complaint in equity against the United States of America and Interstate Commerce Commission, and respectfully shows:

The object of this suit is to enjoin, set aside, and annul a certain order of the Interstate Commerce Commission relating to privately owned coal cars made and entered June 13, 1923, and made effective on March 1, 1925, in a proceeding begun by said Interstate Commerce Commission on its own motion and designated as "Assigned Cars for Bituminous Coal Mines, No. 12530, in re Distribution among Coal Mines of Privately Owned Cars and Cars for Railroad
1054 Fuel," in so far as said order relates and applies to the distribution among bituminous coal mines of privately owned coal cars, and particularly in so far as said order relates and applies to privately owned coal cars of plaintiff and of others similarly situated.

In support thereof plaintiff alleges and shows:

(1) Plaintiff was created by a consolidation agreement dated April 8, 1924, made by Public Service Electric Company, United Electric Company of New Jersey, and Public Service Gas Company and assumed the name of Public Service Electric and Gas Company, and thereby plaintiff acquired all the property, rights, privileges, and franchises of said Public Service Electric Company, United Electric Company of New Jersey, and Public Service Gas Company.

(2) The United States of America is a proper defendant in suits brought to enjoin, set aside, and annul orders of the Interstate Commerce Commission by virtue of the commerce court act (36 Statutes at Large, 539), and district court jurisdiction act (38 Statutes at Large, 219); and the Interstate Commerce Commission is an administrative tribunal, created by the interstate commerce act (24 Statute at Large, 379), approved February 4, 1887, as amended particularly by the transportation act of 1920 (41 Statutes at Large, 456), approved February 28, 1920, and its authority, powers, and limitations are in said acts defined.

(3) The business of the corporations, parties to said consolidation agreement was, and the business of the plaintiff is, generating, manufacturing, and distributing gas and electricity, for light, heat, and

power, for public and domestic use. The distributing systems of plaintiff's property are located in 231 municipalities of the State of New Jersey, containing a population of 2,597,777 in 1920, being more than four-fifths of the entire population of said State. The plaintiff produces an average of 3,082,945 kilowatt hours of electricty per day, which is used for public and private purposes; that is, for lighting dwellings and other buildings and public highways, and generating heat and power, and for manufacturing purposes; and the number of customers of plaintiff using electricity for such purposes is 525,209. Plaintiff also manufactures and distributes about 35,687,293 cubic feet of gas per day on the average for light, heat, and power, much of it being used in ranges for cooking. The number of customers of plaintiff using gas for such purposes is 643,055. The business of plaintiff, both gas and electric, is rapidly increasing in volume.

(4) In carrying on its business plaintiff needs and consumes large quantities of bituminous coal, using daily about 2,800 tons for generating electricity and about 80 tons for the manufacture of gas; and there are no coal mines in the State of New Jersey from which coal can be obtained. The principal generating stations of plaintiff where said coal is used are located at Newark, Jersey City, Paterson, Perth Amboy, Burlington, Trenton, and Camden, in the State of New Jersey. Plaintiff and its constituent companies have obtained the coal used in its and their business from mines in the Commonwealth of Pennsylvania, for more than ten years last past, under contract with Barnes & Tucker Company, the contract now in force being dated March 1st, 1923, for a term of ten years, for the entire output of several bituminous coal mines at Barnesboro and at Bakerton, in said Commonwealth of Pennsylvania, at the rate of more than 1,000,000 tons per year. In the month of September, 1920, said Public Service Electric Company purchased 600 coal cars, at a cost of $1,750,297.97, to carry the coal from said mines to its generating stations and the manufacturing stations of said Public Service Gas Company in New Jersey; and entered into an agreement with Pennsylvania Railroad Company, which operates a railroad between said mines and the points in New Jersey, where the generating and manufacturing plants of plaintiff are located, to haul said cars between said mines in Pennsylvania and said stations in New Jersey, the same being interstate commerce on said railroad, and continually since the purchase of said cars said railroad company has hauled the same for the plaintiff in the transportation of its said coal from said mines to plaintiff's generating and manufacturing stations.

(5) Plaintiff is advised, and believes, and therefore avers, that at the common law a shipper is entitled to furnish and have his own car or cars used and operated for the transportation of his property by railroad companies; that it was and is the duty of said Pennsylvania Railroad Company under its charters and the statutes of the

Commonwealth of Pennsylvania and State of New Jersey to accept said private coal cars of plaintiff and to transport therein exclusively the coal of the plaintiff as aforesaid when it has motive power, labor, trackage, and other facilities available for so doing, without undue delay or discrimination in the transportation of the freight or cars of other shippers; and plaintiff refers to and pleads the act of the general assembly of the Commonwealth of Pennsylvania entitled "An act to incorporate the Pennsylvania Railroad Company," approved April 13, 1846, appearing in the pamphlet laws of said Commonwealth of that year, at page 312; and an act of the legislature of the State of New Jersey entitled "An act to incorporate the New Jersey Railroad and Transportation Company," passed March 7, 1832, and appearing in the pamphlet laws of New Jersey of that year at page 96; the said Pennsylvania Railroad Company being the successor in New Jersey of said the New Jersey Railroad and Transportation Company. The said right of plaintiff to such use of its cars is sanctioned by the acts of Congress creating
1067 the said Interstate Commerce Commission and subsequent acts of Congress relating to and defining its powers and duties.

(6) Plaintiff is advised and believes and therefore avers that said Pennsylvania Railroad Company is willing and able to haul the coal cars of the plaintiff for the purpose aforesaid between said mines in Pennsylvania and said points in New Jersey where plaintiff generates and manufactures electricity and gas, and has at all times been willing and able to haul plaintiff's said coal cars and private cars for other shippers and receivers of coal, desiring to supply them for such use, without undue discrimination or preference in favor of plaintiff or other owners of private cars, or undue prejudice to the interests of any other shippers of freight, or to traffic.

(7) Prior to the time when plaintiff purchased said cars and made said contract for the entire output of said coal mines it was obliged to depend for coal upon the general market, due to the inability of the contracting mine by reason of car shortage to make continuous shipment, and at times its business was seriously embarrassed because of inability to obtain coal as it was needed, and plaintiff often was obliged to purchase coal in the market at excessive prices in order to avoid interruption of its business. Since said cars were purchased and said contract made for the output of said mines the quantity of coal needed by plaintiff in its business has been received regularly, and its business has not been interrupted. If plaintiff is not permitted to use its said cars in the transportation of coal for the purpose aforesaid it would be impossible at times to operate its properties and to render to its customers the service which their necessities require. The effect would be to prevent the lighting of nearly all of the principal highways in the State of New Jersey, to interrupt the operation of many manufacturing establishments, and make it impossible to use at least 100,000 ranges of cooking

1058 by families that are supplied with gas for that purpose by plaintiff and have no other means of cooking food.

(8) Before purchasing said 600 coal cars and while the matter was under consideration said Public Service Electric Company conferred with defendant Interstate Commerce Commission, to ascertain whether the said coal cars could be used in its business in the manner aforesaid if they should be purchased and was assured that it could be done without interference by said Interstate Commerce Commission. And it was with faith in and solely in reliance upon that assurance that the cars were purchased. Whatever right to so use the said cars was obtained by said Public Service Electric Company passed to and was acquired by plaintiff by reason of said consolidation and agreement. Plaintiff avers and charges that the circumstances in this paragraph set forth resulting in its purchase of said cars, estop said Interstate Commerce Commission as against the plaintiff from adopting and putting in force said order made and entered June 13, 1923, and made effective on March 1, 1925; and if not an estoppel such circumstances render said orders arbitrary, unreasonable, unlawful, inequitable, and beyond the power of said commission.

(9) Plaintiff's cars were so acquired and have been continuously used for the above-stated purposes under a rule or regulation in effect upon the railroads transporting plaintiff's coal known as the "assigned car rule," formulated and prescribed by the said commission in 1907, and subsequently reaffirmed and approved by it in numerous proceedings. Said rule may be summarized as follows:

(a) Assigned cars are of three classes:

1. System fuel cars—i. e., cars sent to or assigned to mines on a railroad for loading its fuel coal.

1059 2. Foreign system fuel cars—i. e., cars of one railroad sent to or assigned to mines on another railroad for loading the fuel of the former.

3. Private cars—i. e., noncarrier-owned cars sent by the car owner to its own or other mines for loading coal for the use or disposition of the car owner.

(b) All assigned cars must be placed at the mines to which they are so sent or assigned.

(c) If the number of assigned cars so placed at one mine equals or exceeds the total of cars to which it is that day entitled under the prevailing rate of car distribution among all mines in the district, it is not entitled to placement of any system cars.

(d) If the number of assigned cars placed is less than the distributive share of cars to which the mine is that day entitled, it is entitled that day to sufficient system cars in addition to make up its pro rata distributive share.

(e) The following decisions and reports of the commission in respect of said rule are hereby pleaded, referred to and included

herein by reference with the same effect as if here set forth in extenso to wit:

Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C. 398; Traer vs. Chicago & Alton R. R. Co., 13 I. C. C. 451; Ruttle vs. Pere Marquette R. R. Co., 13 I. C. C. 179; Royal Coal & Coke Co. vs. Southern Ry. Co., 13 I. C. C. 440; Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. 86; Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. 356; In re Private Cars, 50 I. C. C. 652; Assignment of Freight Cars, 57 I. C. C. 760.

(10) On June 13, 1923, the defendant Interstate Commerce Commission made an order purporting to prohibit the use by plain-
1860 tiff of its said cars for the transportation of coal as aforesaid and to subject said cars and other privately owned cars to disposition and allottment by said Interstate Commerce Commission, and by said railroad company in the general business of transporting coal, as if the said cars belonged to the said railroad company now hauling the same as above stated. Said order of June 13, 1923, was made effective on September 1, 1923; but such effective date was postponed from time to time until December 23, 1924, when a final order was made fixing March 1st last as the effective date of said order of June 13, 1923. A copy of said orders of June 13, 1923, and December 23, 1924, are hereto annexed and marked "Exhibit No. 1" and "Exhibit No. 2."

(11) An example of the application of said rule, involving private cars, is as follows:

Assume mine rating or capacity of 30 cars per day; current system car distribution 50 per cent., so that the mine is entitled to placement of not to exceed 15 system cars.

If private cars are assigned to it by their owner, and 30 thereof are available in its locality for placement, it is entitled to have all of them placed, to be loaded, and moved out.

The order of the said commission dated June 13, 1923, would prohibit the placement of more than 15 of said private cars at the mine, and the remaining 15 private cars would either remain idle and unplaced (notwithstanding ample facilities of the railroad in motive power, labor, trackage, and otherwise are available to place and remove them when loaded without delay in service to any others) or would be treated as system cars and be placed at other mines for moving coal for and to others than their owner and without, or
without adequate, compensation to said owner. The alterna-
1861 tive is so stated because plaintiff is advised that said order of the commission does not clearly provide what disposition will hereafter be made of said 15 private cars under such circumstances. If the order is to be interpreted to provide for such other use, the enforcement thereof would effect a taking of plaintiff's property in said cars within due process of law, contrary to the Constitution of the United States.

(12) Plaintiff believes and therefore avers that in times of normal and regular markets for bituminous coal, and except when the lines of railroad are affected by extraordinary conditions such as strikes, the railroad transporting plaintiff's coal can transport the necessary supplies thereof constantly to plaintiff's plants in carrier-owned cars, commonly called system cars, and without the use of the privately owned coal cars of plaintiff. But the experience of plaintiff, and of others similarly situated, has shown that for extended periods, frequently recurring, conditions arise which render the railroads serving plaintiff unable to provide sufficient system cars to transport plaintiff's coal to its plants, and other coal currently offered for transportation. Such inability of the railroads as hereinafter referred to is commonly called "coal car shortage." In such periods the demand for placement of system cars at bituminous mines is in excess and frequently greatly in excess of the number of such cars available for distribution, and it is therefore not possible for mines supplying coal to plaintiff to receive the number of cars per day or other period necessary to transport the required amount of plaintiff's coal to its plants. These conditions occur and may be expected to recur notwithstanding that the railroads serving may be equipped with a legally adequate supply of system coal cars, for as plaintiff is advised, believes, and therefore avers, said railroads are not required by law to provide or furnish sufficient system cars for abnormal peak demands.

1062 (13) Plaintiff's privately owned cars were acquired at the time aforesaid, after its experience had demonstrated that the use of these cars was the only available and legal means by which the necessary number of cars for the transportation of its coal could be provided during such periods and the coal obtained. Experience in the use of said cars has shown that they do fulfil the needs of plaintiff and safeguard delivery of its required coal supplies and thereby the uninterrupted operations of its plants and business.

(14) The effect of said order of June 15, 1925, is to deny to plaintiff in times of coal car shortage the right to use its cars for the transportation of its coal to its plants for its own consumption to such extent as such use might involve a greater car supply to the mines shipping the plaintiff's coal than the prevailing percentages of distribution of system cars. For example: In a period of fifty per cent. car supply, the necessary effect of the said order will be that approximately fifty per cent. of plaintiff's cars will be excluded from service and rendered idle, notwithstanding that plaintiff has coal ready to ship for the essential supply of its plants as aforesaid and notwithstanding the railroad companies are willing and ready to transport such coal and have ample locomotives, labor, tracks, and other facilities to move such shipments and all other traffic currently offering. And this result will be effective in periods when the country and its industries and citizens generally require all the coal that can possibly be moved. There are approximately 30,000 privately-owned coal cars now in service on the railroads of the United States,

and the effect of the commission's order of June 13, 1923, if enforced, would be to exclude from use one-half of such cars, or approximately 15,000 cars, in periods of fifty per cent. car supply, thus diminishing to that extent the number of cars available to serve
1983 the country's needs for coal, at the time of greatest scarcity thereof.

(15) Plaintiff further avers that said order of June 13, 1923, of the Interstate Commerce Commission, is not made in respect of transportation conditions of service, but upon grounds and for reasons and in an attempt to regulate and prescribe matters which are not within the power or jurisdiction of the said commission and concerning which it has no right to act. In particular, the plaintiff avers that the said order, while purporting to be a regulation of transportation in interstate commerce, directly affects and attempts to regulate intrastate commerce, is, in fact, an attempt to regulate and affect the business of mining bituminous coal, including the supply of labor therefor, and to regulate and change commercial and business conditions in said industry not connected with transportation. Said order is, therefore, arbitrary, unreasonable, unlawful and beyond the power of the said commission.

(16) The said order of said commission unjustly and unlawfully discriminates against plaintiff in that private cars owned by other parties are now engaged in the transportation of anthracite coal, ice, fruit, meats, vegetables and other commodities the owners of which are free to have said cars used and operated on railroads subject to the interstate commerce act and within the jurisdiction of the said commission, including the said Pennsylvania railroad, whereby plaintiff is unduly and unlawfully discriminated against and unduly prejudiced by said order of June 13, 1923, in violation of the interstate commerce act, and plaintiff is denied by said order the equal protection of the laws in violation of the Constitution of the United States.

(17) Plaintiff is advised, believes and avers, that in so far
1984 as said order purports to prevent undue discrimination, preference, and prejudice in the use of facilities of railroads, that it is beyond the scope of the investigation as defined by said Interstate Commerce Commission in its order of investigation, and, further, that the record of the hearings before said commission in said proceeding, docket 12530, contains no evidence of any preference or discrimination in the transportation of plaintiff's cars, nor proof of a single instance in which locomotive, labor, track or other public facilities of transportation have been devoted preferentially to the movement of said cars to the prejudice of the movement of coal in system cars or to the prejudice of any other railroad service or traffic whatsoever.

(18) Plaintiff further avers that by the interstate commerce act as amended, particularly by the transportation act of 1920, the said commission is without power to make the order herein complained of, and is without power by the said order to change as thereby

proposed the assigned car rule, as the same has been long established, approved by decisions of the said commission, and of the courts of the United States, at the time said acts were adopted and/or amended by Congress; and plaintiff avers that the said order, denying the right to have its coal cars so placed and used in periods of coal car shortage, and consequently denying to plaintiff the right to have its own coal transported in its own cars to its own plants is unlawful and beyond the power, jurisdiction and competency of the said Interstate Commerce Commission.

(19) Plaintiff avers that said order would, if enforced, deny and abolish its right to use its private cars in times of coal car shortage, the extent of such denial and abolition being measured inversely by the prevailing percentage of distribution of the system cars, and that the order is unlawful for the following reasons:

(a) It constitutes a denial to plaintiff of a right existing at common law preserved by the interstate commerce act, and recognized and re-enacted by Congress, and is thus beyond the power of the said commision.

1065 (b) It constitutes a denial to plaintiff of a right under the laws of the Commonwealth of Pennsylvania and of the State of New Jersey to have its said coal cars transported on the said Pennsylvania railroad and other railroads in said States subject to said laws, which right is preserved by the interstate commerce act, and by the Constitution of the United States; and said order is therefore beyond the power of the said Interstate Commerce Commission.

(c) Said denial of plaintiff's said right is unsupported by any evidence that its exercise has resulted or will result in any undue preference of plaintiff's shipments and is not limited to circumstances in which undue preference may possibly arise in the future, but, on the contrary, is to be enforced at all times of coal-car shortage, and is not supported by evidence, and is unreasonable, arbitrary, and unlawful.

(d) Said order, together with the report made part thereof, while in form purporting to prescribe regulations for the distribution of coal cars among bituminous coal mines as a regulation of transportation by railroads in interstate commerce, is, in substance and intent, an attempt on the part of said Interstate Commerce Commission to regulate the bituminous coal-mining industry by distributing coal production ratably among all mines desiring to operate, or by equalizing working time, and by preventing plaintiff and others from securing their coal where they desire, notwithstanding they are ready to supply their own cars for its movement, and for this reason the said order is beyond the power of the said Interstate Commerce Commission and unreasonable, arbitrary, and unlawful.

(e) Said order and the report made part thereof would, if enforced, unlawfully deprive plaintiff of the beneficial use of its private coal cars without compensation, and would thus deprive plaintiff of its property without due process of law, in violation of the 1066 Constitution of the United States, and cause plaintiff to suffer great and irreparable injury.

Wherefore plaintiff prays:

(1) That a writ of injunction issue restraining and enjoining the defendants, the United States of America and the Interstate Commerce Commission, and each of them, their servants, agents and employees, from enforcing the said order of June 13, 1923.

(2) That it be ordered, adjudged, and decreed that the order of defendant, Interstate Commerce Commission, of June 13, 1923, in so far as it prohibits the placement, loading or transportation of privately owned coal cars of the plaintiff at the mines mentioned in paragraph (4) hereof in excess of the percentage of distribution of system coal cars to which such mines would be entitled in times of coal car shortage, is beyond the lawful authority of the defendant, Interstate Commerce Commission, and without warrant in law, and null and void; and that said order so far as it relates to plaintiff's said cars and the use thereof as aforesaid, be set aside and annulled.

(3 That it be ordered, adjudged, and decreed that the said order of June 13, 1923, and the said order of December 23, 1924, in so far as they or either of them require the carriers to cease and desist from regulations and practices permitting the placement and loading of plaintiff's private cars at mines from which plaintiff obtains coal in excess of the pro rata allotment and distribution of system cars for coal loading currently made to mines which do not receive private cars, and/or the transportation of plaintiff's coal in its said private cars, are beyond the lawful authority of defendant, Interstate Commerce Commission, and without warrant in law, and null and void, and that said orders be set aside and annulled.

1067 (4) That this court adjudge that the reports and orders of defendant, Interstate Commerce Commission, of June 13, 1923, and of December 23, 1924, in so far as they require the carriers to establish, maintain, and enforce regulations and practices whereby mines at which plaintiff's privately owned coal cars are directed to be placed shall not be permitted to receive or load them beyond such mines' pro rata share of the total number of available cars, are beyond the lawful authority of the Interstate Commerce Commission, and without warrant in law, and null and void, and that said reports and orders be set aside and annulled.

(5) That it be adjudged, ordered, and decreed that any regulations and practices affecting privately owned coal cars published by any carriers by railroad in conformity with said orders of June 13, 1923, and December 23, 1924, be and the same are in violation of the legal rights of plaintiff, and unlawfully restrict and deny its right to transportat on service from such carriers, and are without warrant in law, and null and void.

(6) That defendant, the United States of America, and defendant, Interstate Commerce Commission, and each of them, be perpetually restrained and enjoined from restricting, in accordance with said Interstate Commerce Commission orders dated June 13, 1923, and December 23, 1924, the full and exclusive use and enjoyment of privately owned coal cars, and particularly the coal cars of the plaintiff.

(7) That this honorable court will grant unto the plaintiff a writ of subpoena directed to the defendants and each of them commanding them on a certain day therein to be specified, to be and appear before this honorable court and then and there full, true, and complete answer make to all and singular the premises, and to
1068 perform and abide by such order and decree herein as shall seem meet and agreeable to equity and good conscience.

(8) That due and proper notice of this bill of complaint be served forthwith on the defendants herein and on each of them, as provided by law.

(9) That plaintiff may have such other and further relief in the premises as to equity may appertain and as may be deemed to be proper.

And the plaintiff will ever pray.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
By FRANK BERGEN,
Solicitor and Counsel for Plaintiff,
80 Park Place, Newark, New Jersey.

AUGUST G. GUTHEIM,
JAMES W. CARMALT,
Of Counsel.

1074–1074½ **In United States District Court**

[Title omitted.]

Answer of the United States

Filed May 7, 1925

United States of America, defendant, by its counsel, now comes and, for answer to the bill of complaint filed herein against it, says:

I, II. On information and belief, defendant admits the facts alleged in Paragraphs I and II in manner and form as alleged.

III, IV, V, VI, VII. Defendant has no knowledge of the matters and things alleged in Paragraphs III, IV, V, VI, and VII, it neither admits nor denies the same, and in so far as they may become material upon the hearing, it will require strict proof thereof.

VIII. Defendant denies the matters and things alleged in Paragraph VIII and each and every part of the same in manner and form as alleged and all of the inferences sought to be created thereby.

IX. Defendant has no knowledge of the matters and things, alleged in Paragraph IX, it neither admits nor denies the same,
1075 and in so far as they may become material upon the hearing, it will require strict proof thereof, with this exception: Defendant admits, subject to verification, the commission made and published the eight (8) reports which are identified by the titles thereof.

X. Defendant denies the matters and things alleged in Paragraph X and each and every part of the same, in manner and form as alleged, and all of the inferences sought to be created thereby, with this exception: Defendant admits the commission made and entered the orders of June 13, 1923, and December 23, 1924, and, subject to verification, Exhibit No. 1 and Exhibit No. 2, respectively, are true copies thereof.

XI, XII, XIII, XIV. Defendant has no knowledge of the matters and things alleged in Paragraphs XI, XII, XIII, and XIV; it neither admits nor denies the same, and, in so far as they may become material upon the hearing, it will require strict proof thereof.

XV. Defendant denies the matters and things alleged in Paragraph XV and each and every part of the same, in manner and form as alleged, and all of the inferences sought to be created thereby.

XVI. Defendant has no knowledge of the facts alleged in Paragraph XVI, in manner and form as alleged; it neither admits nor denies the same, and, in so far as they may become material upon the hearing, it will require strict proof thereof.

XVII, XVIII, XIX. Defendant denies the matters and things alleged in Paragraphs XVII, XVIII, and XIX, and each and every part of the same, in manner and form as alleged, and all of the inferences sought to be created thereby.

Further answering, defendant alleges that the matters and things set forth in the bill of complaint, and sought to be put in issue 1076 before the court, were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine, under the provisions of the interstate commerce act; in its reports in writing with respect thereto, made after full hearing and on due notice to all of the parties, which state its conclusions, together with its decision, order, or requirement in the premises, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence before the commission, of which the parties were advised. On the hearing hereof, defendant will file herein true copies of the reports of the commission in case "Assigned Cars for Bituminous Coal Mines," No. 12530, dated June 13, 1923, and December 23, 1924, respectively, and reported in 80 Interstate Commerce Commission Reports at pages 520 to 563, inclusive, and 93 Interstate Commerce Commission Reports at pages 701 to 738, inclusive, respectively; and the reports are now hereby referred to and included by reference herein with the same effect as if here set forth in extenso.

Defendant alleges that the facts set forth in the reports of the commission, and each and all of the same, are true and correct.

Defendant specifically denies—

(a) Any fact or facts alleged in the bill of complaint, or any part of the same, which are inconsistent with any fact or facts found by the commission.

(b) Any and all inferences of fact from any particular fact or facts alleged in the bill of complaint, or any part of the
1077 same, which seek to deny, or which are inconsistent with, any fact or facts found by the commission.

(c) Any fact or facts alleged in the bill of complaint, or any part of the same, which deny, or which seek to deny, any fact or facts found by the commission.

(d) Any fact or facts alleged in the bill of complaint or any part of the same, which set up, or which seek to set up, matters and things which were not before the commission.

(e) Any fact or facts alleged in the bill of complaint, or any part of the same, which attack or which seek to attack the action of the commission, and to show facts other than what the commission has found and declared.

(f) Any allegations in the bill of complaint, or any part of the same, which allege that facts were found by the commission in its reports and orders which, as shown on the face thereof, were not so found.

(g) Any conclusions of law alleged and insisted upon in the bill of complaint, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission.

(h) Each and every allegation in the bill of complaint contained not herein specifically admitted or denied.

Wherefore, having fully answered, defendant prays that the bill of complaint be dismissed at the cost of plaintiff and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
GEORGE W. COLES,
United States Attorney.

1078 [*Duly sworn to by Blackburn Esterline; jurat omitted in printing.*]

1079-1080 In United States District Court

No. 3317

[Title omitted.]

Answer of Interstate Commerce Commission.

Filed May 7, 1925

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's

bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs (1) and (2) of the bill of complaint, the commission admits, for the purposes of this suit, that the allegations of fact therein contained are true.

1080a

II

Answering paragraphs (3) to (19), inclusive, of the bill of complaint, the commission alleges that by an order dated March 22, 1921, the commission instituted a proceeding and an investigation on its own motion into and concerning the reasonableness and propriety of car distribution rules of carriers by railroad in the United States in so far as they applied to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary; that the proceeding so instituted was entitled *In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel*, and is on the docket of the commission as No. 12530; that all common carriers by railroad subject to the provisions of the interstate commerce act, including the Pennsylvania Railroad Company, referred to in said paragraph (4), were made parties to said proceeding as respondents, and that said order was served upon each of said respondents.

The commission further admits and alleges that it made and entered, and served upon all the respondents in said proceeding, its report and order of June 13, 1923, which order is referred to in paragraph (10); that said order was made effective on September 1, 1923; that the effective date thereof was postponed from 1080b time to time until December 23, 1924; that the commission on the date last mentioned made and entered, and served upon all the respondents in said proceeding, its supplemental report and order of December 23, 1924, which order is referred to in paragraph (10); and that by said report and order of December 23, 1924, the commission fixed March 1, 1925, as the effective date of said order of June 13, 1923.

The commission further alleges that subsequent to the service of said order of March 22, 1921, as aforesaid, it accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order was submitted to the commission for consideration, including testimony and evidence submitted on behalf of the Public Service Electric Company, predecessor in title of plaintiff herein as set forth in paragraph (1); that at said hearings and subsequently, both orally and in briefs

filed in said proceeding, including briefs and oral argument in behalf of said Public Service Electric Company, questions relating to said matters were fully argued and submitted to the commission for determination; and that the commission determined said matters and made and entered, and served upon all the parties to said proceeding, said report and order of June 13, 1923, and said supplemental
1081 report and order of December 23, 1924, which included the commission's decisions, conclusions, orders, and requirements in the premises.

The commission further alleges that, in said report and order of December 23, 1924, it affirmed its findings of unreasonableness, undue prejudice, and undue preference contained in said report of June 13, 1923.

The commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report and order of June 13, 1923, and said supplemental report and order of December 23, 1924, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, by their respective counsel, and all matters called to its attention by said Public Service Electric Company.

The commission further alleges that said order of June 13, 1923, as modified by said order of December 23, 1924, was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an
1082 unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said bill of complaint.

In particular the commission denies that, as alleged in paragraph (8), the commission assured the Public Service Electric Company that it could use its coal cars in the manner referred to in said paragraph without interference by the commission and denies that any circumstances exist which in any way estop the commission as against the plaintiff from adopting and putting in force said order made and entered June 13, 1923, or which render said order arbitrary, unreasonable, unlawful, inequitable, or beyond the power of the commission.

The commission further denies that irreparable injury or legal injury of any kind will result to plaintiff if said order of June 13, 1923, as modified by said order of December 23, 1924, is not enjoined and set aside as prayed for by plaintiff.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said bill of complaint, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of June 13, 1923, as modified by said report and order of December 23, 1924, which said reports and orders are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to
1083 aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By R. GRANVILLE CURRY,
Assistant Counsel.

P. J. FARRELL,
Of Counsel.

[*Duly sworn to by Clyde B. Aitchison; jurat omitted in printing.*]

1084–1085 In United States District Court

[Title omitted.]

Petition of Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation, for leave to intervene

Filed May 21, 1925

To the Honorable the Judges of the United States District Court for the Eastern District of Pennsylvania, sitting in equity:

Come now the Pocahontas Operators' Association, the Empire Coal & Coke Company, and the Pocahontas Fuel Company, Incorporated, and respectfully represent that the petitioners, and each of them, have an interest in the matters in controversy in the above-entitled proceeding, and desire to intervene in and to become parties to said proceeding and for grounds of the proposed intervention say:

The petitioner, Pocahontas Operators' Association, is an
1086 unincorporated, voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized, and doing business under the laws of the State of West Virginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia, said association being organized for the purpose of doing the work ordinarily done by trade associations in connection with preserving and promoting the general interests of its members.

The petitioner, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

The petitioner, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

All of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virginia and in the State of Virginia.

The principal offices of the petitioners are as follows: Pocahontas Operators' Association, Bluefield, W. Va.; Empire Coal & Coke Company, Landgraff, W. Va.; Pocahontas Fuel Company, Incorporated, Boissevain, Va.

Petitioners file this petition in their own behalf and also on behalf of all of the other members of the said Pocahontas Operators' Association. The questions involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracti-
1087 cable to bring them all before the court, and these petitioners file this petition on behalf of the whole.

Petitioners, and those on whose behalf this petition is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these petitioners. Petitioners are therefore interested in the general question to be determined in this case.

Pocahontas Operators' Association, on behalf of all of its members, including said other petitioners herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding begun by the commission on its own motion, entitled "Assigned Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief and presented oral argument before the commission against the contentions of the carriers and plaintiffs in this suit, that said carriers had the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and manner claimed to be their right in
1088 the bill herein. These petitioners are therefore proper parties defendant in this suit.

Wherefore, These petitioners pray:

(a) That leave be granted them to intervene and to be treated as parties defendant herein, and that leave be granted them to file an answer to the bill herein, with the right to have notice of and appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and be heard in person or by counsel, upon brief and in oral argument.

(b) That this court order that due and proper service of this petition be forthwith made, by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice, as in the district court jurisdiction act provided, and by serving a copy hereof upon each of the complainants herein.

And your petitioners as in duty bound will ever pray, etc.

GREEVER & GILLESPIE,
Solicitors for Petitioners.

E. L. GREEVER,
J. F. BULLITT,
Of Counsel.

MAY, 1925.

1089 [Duly sworn to by Wm. C. Atwater et al.; jurat omitted in printing.]

1089-1093 **In United States District Court**

[Title omitted.]

Answer of the Pocahontas Operators' Association, Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation.

These defendants, Pocahontas Operators' Association, Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, having been made parties defendant herein by order of court, for answer to the bill of complaint filed herein say:

1094 I

That the defendant, Pocahontas Operators' Association, is an unincorporated voluntary association, the membership of which is made up of numerous corporations, some of them chartered, organized, and doing business under the laws of the State of West Virginia, and some of them chartered, organized, and doing business under the laws of other States, and all of which are engaged in the business of mining and shipping coal in the States of West Virginia or Virginia, said association being organized for the purpose of doing the work ordinarily done by trade associations in con-

nection with preserving and promoting the general interests of its members.

That the defendant, Empire Coal & Coke Company, is a West Virginia corporation, engaged in the business of mining and shipping coal in the State of West Virginia.

That the defendant, Pocahontas Fuel Company, Incorporated, is a Virginia corporation, engaged in the business of mining and shipping coal in the States of West Virginia and Virginia.

That all of the members of the said Pocahontas Operators' Association, including the said Empire Coal & Coke Company and the Pocahontas Fuel Company, Incorporated, are served by the Norfolk & Western Railway Company, both in the State of West Virgina and in the State of Virginia.

That the principal offices of these defendants are as follows:

Pocahontas Operators' Association, Bluefield, W. Va.;

Empire Coal & Coke Company, Landgraff, W. Va.;

1995 Pocahontas Fuel Company, Incorporated, Boissevain, Va.

That the defendants file this answer in their own behalf, and also on behalf of all of the other members of the said Pocahontas Operators' Association. The question involved in this case are of common and general interest to all of said members of said association. Such members constitute a class so numerous as to make it impracticable to bring them all before the court, and these defendants file this answer on behalf of the whole.

That the defendants, and those on whose behalf this answer is filed, have an interest in the matters in controversy in this cause by reason of the fact of the mining and shipping of coal by them on the line of the Norfolk & Western Railway Company, as aforesaid, in which business the method and manner of distribution of coal cars to their mines by said railway company is of great importance, and particularly because their lawful car supply will be directly and unlawfully limited and restricted by the assignment of privately owned cars by said railway company in the way and manner alleged in the bill of complaint to be within the right and authority of railway companies to assign them, and alleged in the bill of complaint to be the way and manner to which the plaintiffs are entitled to have said privately owned cars assigned, to the great injury and damage of these defendants. Defendants are therefore interested in the general question to be determined in this case.

That Pocahontas Operators' Association, on behalf of all of its members, including said other defendants herein, appeared before the Interstate Commerce Commission, by counsel, in the proceeding

begun by the commission on its own motion, entitled "Assigned

1996 Cars for Bituminous Coal Mines, Docket No. 12530, In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," mentioned and referred to in the bill, and cross-examined witnesses, introduced evidence, filed their brief, and presented oral argument before the commission against the conten-

tions of the carriers and plaintiffs in this suit, that said carriers have the right to distribute their own cars for their own fuel purposes, and to distribute privately owned cars in the way and manner claimed to be their right in the bill herein.

II

That on information and belief these defendants admit the facts alleged in paragraphs 1 and 2 of the bill of complaint.

III

That these defendants are without knowledge as to the truth or falsity of the allegations contained in paragraphs 3 and 4 of the bill of complaint, but aver and charge that, however this may be, said allegations are immaterial.

IV

That these defendants deny all of the allegations contained in paragraph 5 of the bill of complaint, and particularly deny that it is true, as alleged in said paragraph, that "the said right of plaintiff to such use of its cars is sanctioned by the act of Congress creating the said Interstate Commerce Commission, and subsequent acts of Congress relating to and defining its powers and duties"; and further deny that there is anything in the acts of the Commonwealth
1097 of Pennsylvania, the acts of the State of New Jersey, or in the act of Congress creating the Interstate Commerce Commission, referred to in said paragraph of the bill of complaint, which would limit or restrict the power and authority of the Interstate Commerce Commission so as to render its orders entered in the proceeding referred to in the bill of complaint unlawful or void, but, on the contrary, defendants say that said orders were entered under and in accordance with the statutory powers and duties of the Interstate Commerce Commission.

V

That these defendants are without knowledge as to the matters alleged in paragraph 6 of the bill of complaint, except that they specifically deny that the Pennsylvania Railroad, as alleged therein, "is willing and able to haul the coal cars of plaintiff * * * without undue discrimination or preference in favor of plaintiff or other owners of private cars, or undue prejudice to the interest of any other shippers of freight, or to traffic," but aver the fact to be that any such hauling of said coal cars by said railroad company would be unduly preferential in favor of plaintiff, and unduly prejudicial to the interests of other shippers of freight, and to traffic, as found by the commission, and that said finding is final and binding upon the plaintiff.

VI

That these defendants are without knowledge as to the truth or falsity of the allegations contained in paragraph 7 of the bill of complaint, but aver that the same are immaterial and irrelevant to the issues in this case, in that the size of plaintiff's business
1098 and its methods of conducting the same constitute no justification for the distribution of coal cars in any manner which will give to plaintiff undue preference or work undue prejudice against other shippers.

VII

That these defendants are without knowledge as to whether or not, as alleged in paragraph 8 of the bill of complaint, "before purchasing said 600 coal cars, and while the matter was under consideration, said Public Service Electric Company conferred with defendant, Interstate Commerce Commission, to ascertain whether the said coal cars could be used in its business in the manner aforesaid if they should be purchased, and was assured that it could be done without interference by said Interstate Commerce Commission, and it was with faith in and solely in reliance upon that assurance that the cars were purchased"; but defendants aver that, however this may be, these allegations are irrelevant, for the reason that no such assurance on the part of the Interstate Commerce Commission, and no such reliance on the part of the Public Service Electric Company (predecessors of plaintiff), could in any way or manner operate to restrict or limit the authority of the Interstate Commerce Commission, or render invalid and unlawful any order entered by the commission within the scope of its power and authority, and defendants aver that the order of said commission under attack in the bill of complaint was entered by the commission within the scope of its authority, and that the same is lawful and binding upon plaintiff.

Defendants further deny that it is true, as alleged in said bill of complaint, that "the circumstances in this paragraph set forth, resulting in its purchase of said cars, estopped said Interstate
1099 Commerce Commission, as against the plaintiff, from adopting and putting into force the order entered June 13, 1923 and made effective on March 1, 1925," and further deny that, as alleged in said paragraph, "said circumstances render said orders arbitrary, unreasonable, unlawful, inequitable, and beyond the power of said commission."

VIII

That these defendants are advised and aver that it is immaterial whether or not it is true, as alleged in paragraph 9 of the bill of complaint, that "plaintiff's cars were so acquired and have been continuously used for the above-stated purposes under a rule or regulation in effect upon the railroads transporting plaintiff's coal,

known as the 'assigned-car rule'"; for the reason that said "assigned-car rule" was then and has been at all times since subject to change by the Interstate Commerce Commission upon such showing of facts as it deems sufficient to warrant such change, and plaintiff's private cars were acquired with full knowledge that this power and authority existed in the Interstate Commerce Commission, and that it acquired such cars subject to that authority.

IX

That these defendants are advised and so aver that it is immaterial whether or not, as alleged in Paragraph II of the bill, the order of the commission dated June 13, 1923, mentioned therein, might so operate as to cause a part of plaintiff's private cars to remain idle and unplaced, for the commission has held in said order that plaintiff's privately owned cars can not be placed at the mines or transported by the railroads in excess of the pro rata share of cars to which such mines are entitled, without thereby creat-1100 ing undue preference to the owners of such cars or of such mines and undue prejudice against the owners of other mines, and the fact, if fact it be, that some of plaintiff's cars may be forced to remain idle, can not justify their use in a way and manner to constitute undue preference to the plaintiff and undue prejudice to other shippers of coal.

Defendants further deny that it is true, as alleged in said paragraph 11 of the bill, that "if the order is to be interpreted to provide for such other use (meaning use as system cars) the enforcement thereof would effect a taking of plaintiff's property in said cars without due process of law, contrary to the Constitution of the United States."

X

That these defendants are without knowledge as to the truth or falsity of the allegations contained in paragraph 12 of the bill of complaint, but aver that, however this may be, they are immaterial, for the reason that they can not justify the use of private cars in the way and manner which the commission has rightfully held to be unduly preferential and discriminatory, and therefore unlawful.

XI

That these defendants admit that it is true, as alleged in paragraph 14 of the bill of complaint, that the effect of the order of the commission dated June 13, 1923, "is to deny to plaintiff in times of coal-car shortage the right to use its cars for transportation of its coal to its plant for its own consumption to such an extent as such use might involve a greater supply to the mines shipping the plaintiff coal than the prevailing percentage of distribution of system

cars," but aver and charge that said result does not make
1101 unlawful the said order of the commission complained of in the bill of complaint, and it is immaterial whether or not, as alleged in the bill, "approximately fifty per cent of plaintiff's cars will be excluded from service and rendered idle" by said order, for the commission has rightfully held that any other method of using plaintiff's cars would be unlawful, in that such other use would be unduly preferential to plaintiff and unduly discriminatory to others.

These defendants are without knowledge as to the allegations in said last mentioned paragraph of the bill of complaint as to the number of privately owned cars in the United States now in service, or as to the effect of the commission's order on their use, but aver that it is immaterial what that effect may be.

XII

That these defendants deny all of the allegations contained in paragraph 15 of the bill of complaint, and particularly deny that it is true, as there alleged, that "said order is therefore arbitrary, unlawful, unreasonable, and beyond the power of said commission."

XIII

That these defendants deny all of the allegations contained in paragraph 16 of the bill of complaint, and particularly deny that said order of the commission unjustly and unlawfully discriminates against the plaintiff, and deny that "plaintiff is denied by said order the equal protection of the laws, in violation of the Constitution of the United States."

1102

XIV

That these defendants deny each and every allegation contained in paragraphs 17 and 18 of the bill of complaint.

XV

That these defendants deny that it is true as alleged in paragraph 19 of the bill of complaint, that the said order of the commission is unlawful for the reasons therein given, or for any other reason or reasons, and particularly deny each and every fact alleged in the reasons therein given for the allegations that said order is unlawful, and deny all inferences drawn from said allegations.

XVI

That these defendants deny that the plaintiff is entitled to the relief prayed for in the bill of complaint, or to any part thereof.

XVII

That the defendants here adopt and ask to be read as a part hereof, as if herein set out in extenso, Paragraph II of the answer of the Interstate Commerce Commission filed to the bill of complaint herein.

XVIII

Defendants further say that the use of privately owned cars in the manner alleged in the bill of complaint to be lawful would result, as found and held by the commission, in undue preference and discrimination in favor of the mines to which they would be assigned, and in undue prejudice and damage to all other mines,
which would result in the driving out of the business of
1103 mining and shipping coal of all mine owners not able or not willing to invest in cars for their own use. This preferential use of such cars is condemned by the commission in the reports and orders complained of, after considering full and complete evidence on the subject, and defendants are advised and aver that said reports and orders are plainly right and within the statutory powers of the commission.

The defendants further say that the use of privately owned cars alleged in the bill of complaint to be lawful results in the taking of private property and property rights for the benefit of private interests, which finds no justification under the law under any conditions.

The commission might lawfully have held, in the exercise of its discretion and within its statutory powers, that the moment the private owner of a car parts with its possession for hire to the railroad company it becomes a part of the equipment of the railroad company, and must be devoted, under the law, to the public service. Privately owned cars in the use of railroad companies are governed by all the laws regulating interstate commerce, and are under the authority and control of the Interstate Commerce Commission.

This principle has long been recognized by the Interstate Commerce Commission to the extent of exercising control over the operations of privately owned cars, and to the extent of requiring that they be counted as part of the total supply of cars, and the statute gives the commission the power to fix the compensation to be paid by the carriers for their use.

In the orders of the commission under investigation in this
1104 case, the commission has declared that the mines served by the privately owned cars shall not receive from time to time more cars than their pro rata shares when compared with other mines, holding that any other practice is unduly discriminatory and preferential, and defendants are advised and aver that the commis-

sion might, in the exercise of its statutory discretion, have further held that in fact all coal cars for the use of which the railroad company pays must be counted, treated, and used in all respects as system cars.

Defendants further aver the facts to be in this case, as shown by the evidence introduced before the commission by the owners of said private cars, and admitted in the bill of complaint, that the railroad companies do not pay for the use of the privately owned cars in evidence before the commission an adequate compensation, but that they pay amounts barely sufficient to keep up repairs on the cars. These amounts do not provide for depreciation or for return on invested capital, and therefore the owners of said private cars in fact pay a bonus to the railroad companies in the form of furnishing invested capital free of charge for which they receive in return the privilege of using the railroad companies' motive power, road and terminal facilities, and administrative services to a greater extent than can be used by others. While they nominally pay the same freight rates on their coal as are paid by others, they in fact pay a higher rate, for which they receive a different and better service, and therefore the owners of private cars operate under special contracts with the carriers, from the benefits of which the general public is excluded because of lack of money or unwillingness to furnish the equipment necessary to give them such special and better service.

1105 Defendants further say that they are advised and so aver the fact to be that any greater or better service afforded by the railroads to one or more mines than is furnished to other mines is unduly and unlawfully preferential and discriminatory, no matter for what reason it is given, and that all the allegations contained in the bill of complaint seeking to justify such practice are irrelevant and immaterial.

The complaints declare that by reason of their ownership of private cars they are entitled to have greater and better service from the railroad companies than said railroad companies can render to other shippers of coal, and declare that the said reports and orders of the Commission deprive them of that greater and better service. Defendants are advised and so aver and charge that the law is that the railroads shall furnish equal service to all, and this contemplates the fact of equal treatment under any and all circumstances, and it is contrary to the spirit of the law that any shipper may obtain preferential service over other shippers under any conditions.

Wherefore, having fully answered, defendants pray that the bill of complaint be dismissed in this cause, and for such other and further order as may be proper.

In testimony whereof, the defendant, Pocahontas Operators' Association, has caused its name to be signed hereto by its president, and

defendant, Empire Coal & Coke Company, has caused its name to be signed hereto by its president, with its corporate seal affixed
1106 attested by its secretary, and defendant, Pocahontas Fuel Company, Incorporated, has caused its name to be signed hereto by its vice-president, with its corporate seal affixed, attested by its secretary.

POCAHONTAS OPERATORS' ASSOCIATION,
By ——— ———, *President.*
EMPIRE COAL & COKE COMPANY,
By ——— ———, *President.*

Attest:
——— ———, *Secretary.*
POCAHONTAS FUEL COMPANY, INC.,
By ——— ———, *Vice President.*

Attest:
——— ———, *Secretary.*
GREEVER & GILLESPIE,
Counsel for Defendants.

E. L. GREEVER,
Of Counsel.

MAY, 1925.

1107–1110 In United States District Court

No. 3317

[Title omitted.]

Amendment to answer

Filed May 27, 1925

By their respective counsel, the defendants, the United States and Interstate Commerce Commission, concede:

1. That the court and counsel may refer to the act of the General Assembly of the Commonwealth of Pennsylvania of date April 13, 1846, and the act of the Legislature of the State of New Jersey of date March 7, 1832, referred to in paragraph (5) of the bill for injunction, as fully and completely as if certified copies of the acts and each of them were duly offered and received in evidence;

2. The railroad carriers over whose lines the cars of the plaintiff move have been and are willing to handle them.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1111 In United States District Court

No. 3317

[Title omitted.]

Before the Honorable Victor B. Woolley, United States circuit judge; the Honorable J. Whitaker Thompson and the Honorable W. H. Seward Thomson, United States district judges, sitting in the district court pursuant to urgent deficiencies act (38 Stat. 219).

On final hearing

William H. Speer, Frank Bergen, Henry S. Drinker, jr., August G. Gutheim, and James W. Carmalt for the plaintiff.

Blackburne Esterline, assistant to the Solicitor General, for United States, R. Granville Curry, for Interstate Commerce Commission; E. L. Greever, for Pocahontas Operators' Association, et al., intervenors.

[File endorsement omitted.]

1112 *Testimony of Dudley Farrand*

Filed Sept. 24, 1926

DUDLEY FARRAND, being duly sworn, was examined and testified as follows:

By Mr. SPEAR:

Q. What is the business of the Public Service Electric and Gas Company?

A. The Public Service Electric and Gas Company is a public utility having two distinct branches, the electric branch and the gas branch. The electric branch is a central station electric power company furnishing electricity for light, heat, power, and all the purposes for which commercial electricity is used. Similarly, the gas branch is a central station gas company manufacturing and distributing gas for all purposes for which gas is used—light, heat, power, etc. It covers a large field in New Jersey, some 231 municipalities in 11 counties. The population included within the area supplied by these two companies is in excess of two and a half millions, or more than 80 per cent of the population of the State.

Mr. ESTERLINE. I would like to record at this time an objec-
1113 tion to the testimony of this witness the same as has already been recorded in the testimony of the witnesses in the other cases.

The COURT. Let the objection be noted, and it will be overruled and an exception allowed to the defendants.

By Mr. SPEAR:

Q. Will you proceed?

A. The company has in its electric department in excess of 525,000 customers and in its gas department some 640,000, or approximately

1,200,000 customers a day, in addition to which it supplies local and interurban railway facilities for approximately 900 miles of track. The business is growing rapidly. The electrical department added 100,000 additional customers last year and the gas department in excess of 30,000. It requires continuous operation to supply the several services 24 hours a day every day in the week.

Q. These customers of these utilities are customers that use the product for both public and domestic consumption?

A. For all purposes.

Q. What is your position with the Public Service Electric and Gas Company?

A. At the present time I am vice-president.

Q. In the carrying on of these businesses, does this company use any bituminous coal?

A. It uses bituminous coal in large quantities both in the electric and gas department.

1114 Q. What is the average consumption of bituminous coal?

A. The average consumption in 1924 on a 365-day basis for the electric department was a little over 2,800 tons per day and in the gas department about 900 tons per day.

Q. Where are the principal generating stations where this coal is used?

A. They are in the principal centers of New Jersey—Patterson, Jersey City, Newark, Kearney, Perth Amboy, Trenton, Camden, and some others. In the electric department there are fourteen plants of which ten run regularly and the other four for emergency. In the gas department there are twelve manufacturing stations, of which six run continuously and the others are for emergency purposes.

Q. Where does the company procure its bituminous coal for these stations?

A. Generally in the Pennsylvania fields.

Q. And imported by what railroad company?

A. In very large part by the Pennsylvania Railroad.

Q. And the Pennsylvania Railroad Company has shown its willingness at all times to transport the cars of the Public Service Electric and Gas Company, has it not?

A. It has.

Q. And the Public Service Electric and Gas Company is a consolidation of the Public Service Electric Company and the Public Service Gas Company, which consolidation occurred recently?

1115 A. About a year ago, I think the date was April, 1924.

Mr. SPEAR. The Government does not dispute that this is a corporation?

Mr. ESTERLINE. If you say so, we don't dispute it.

By Mr. SPEAR:

Q. Does it own its own cars?

A. It does.

Q. How many cars does it own?

A. Six hundred coal cars at the present time. They were purchased in 1920.

Q. Will you tell us under what circumstances those cars came to be purchased?

A. After the stress of the war and the succeeding strike period the conditions were such we could not maintain continuous service depending on the supply from the spot market. We have had for many years contracts with reliable producers of coal, and in most every case the coal was available at the mines. It became a question of transportation. The only feasible way of taking care of transportation in times of stress is and always has been a matter of assigned cars, and it was only through priority orders first by the War Department during the war and other Government departments, and later by the Interstate Commerce Commission, that we were able to keep going as continuously as we were. We had repeated interruptions due to shortage of fuel, although there was
1116 always coal at the mines for which we had contracts, and it was a question of transportation. We took it up with all departments at Washington with which we could get a hearing. I ran the whole gamut of the Interstate Commerce Commission office, and finally took it up with the commissioner in charge of car service, known as division No. 5 of the Interstate Commerce Commission.

Q. That is Commissioner Aitchison?

A. Commissioner Aitchison.

Q. What happened?

Mr. ESTERLINE. Objected to as wholly irrelevant and immaterial as to what commissioners at Washington this witness talked with and what the commissioners said and what he said to the commissioners. In the first place, it prolongs this thing, and in the second place it is wholly irrelevant and immaterial as to what he did and what he said or what was said to him, and if they are seeking to prove an estoppel on the part of the Interstate Commerce Commission on account of what somebody told him as to whether he was to have these cars or how he could get them, it would not be binding.

The COURT. You are not laying any ground for estoppel?

Mr. SPEAR. What Mr. Farrand was going into in a historical way is already in the case in evidence, so I will just withdraw that question.

1117 Mr. SPEAR:

Q. Will you tell us whether or not there is at present a contract existing for the purchase of coal by the Public Service Electric and Gas Company?

A. We have contracts for ten years, dated some time early in 1923, for the complete output of a number of mines aggregating a million tons a year, located in the Barnesboro and Bakerton district of the Pennsylvania fields. That is with the Barnes-Tucker Company, and is sufficient to supply the needs of the Public Service Electric Corporation, which was the name of the corporation at the time the contract was made.

Q. I understood you to say it was made the first of 1923—March 1, 1923?

A. If that be the date.

Q. And it runs for a period of ten years?

A. Ten years; and we have a right to take the entire output of that series of mines and not less than one million tons per year.

RALPH J. BAKER, Esq. I would like to ask a question on behalf of the Seaboard By-Product Coke Company.

By Mr. BAKER:

Q. Your reference on direct examination to a consolidation was a consolidation between the Public Service Electric Company and the Public Service Gas Company?

A. It was.

1118 Q. State whether or not the Public Service Gas Company is the same Public Service Gas Company which Mr. H. B. Rust testified before the commission on behalf of the Seaboard By-Product Coke Company was the purchaser of large quantities of by-product gas from the Seaboard Company?

A. It is. We have a contract to take 25,000,000 cubic feet a day in addition to the 35,000,000 we manufacture ourselves.

Mr. BAKER. May it be agreed that for the records in the several by-products company cases the testimony given by Mr. Farrand may be stipulated across into the record of No. 3275, Ramey-Wood Coke Company vs. United States.

Mr. ESTERLINE. Of course it goes subject to the objections we have already made.

The COURT. It will be admitted subject to the objections.

1119 SEPTEMBER 13, 1926.

Stipulation

The parties, by their respective counsel, stipulate that the foregoing eight pages constitute a correct transcript of the testimony of Dudley Farrand taken before the court on the argument which, in certifying a transcript to be used on the appeal, shall be included therein by the clerk.

FRANK BERGEN,
Solicitor for Plaintiff.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

Approved.

J. W. THOMPSON,
United States District Judge.

1120 In United States District Court

Statement re opinion

[For the opinion of the court filed November 25, 1925, see record in the case of United States of America, defendant, and Interstate Commerce Commission, intervening defendant, vs. the Akron, Canton & Youngstown Railway Company, et al.]

1121 In United States District Court

No. 3317

[Title omitted.]

Final decree

Filed Dec. 15, 1925

This cause came on to be heard at this term on bill of complaint, answers, and evidence submitted, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

1. That the order of the Interstate Commerce Commission in the case entitled "Assigned Cars for Bituminous Coal Mines (in re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel) No. 12530," entered at a general session of the commission at its office in Washington, D. C., on June 13, 1923, as affirmed by its further order of December 23, 1924, be and the same is hereby set aside, annulled, and suspended.

2. That a permanent injunction be and the same is hereby granted and issued out of this court as prayed in the bill of complaint and the defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be and they are hereby permanently restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

By the court.

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. WHITAKER THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1122 In United States District Court

No. 3317

[Title omitted.]

Petition for appeal by United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America and Interstate Commerce Commission, defendants, feeling themselves aggrieved by the final order or decree of the district court made and entered December fifteenth, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. COLES,
United States Attorney,
Eastern District of Pennsylvania.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1123 In United States District Court

No. 3317

[Title omitted.]

Assignments of Error of the United States and Interstate Commerce Commission

Filed Feb. 6, 1926

United States of America and Interstate Commerce Commission, defendants, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the district court entered December fifteenth, 1925.

The district court erred:

I. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

II. In not dismissing the bill for injunction for want of equity.

III. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

IV. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

V. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft-coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

1124 VI. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

VII. In holding "that the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

VIII. In holding "that there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

IX. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private-car owners of the use of their mines and cars."

X. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

XI. In holding that the "valuable legal right in the ownership of private cars * * * furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage."

XII. In holding that the compensation to the owners for the use by railroads of private cars has been fixed by the commission at one and one-half cents per mile.

XIII. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned-car mines will result if the assigned car rule is abolished.

XIV. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

XV. In holding that "the right to the use of private cars" is not subordinate to the power of Congress and of the commission to regulate interstate commerce.

1125 XVI. In failing to discriminate between the legal title of the plaintiff in and to the cars, and the use of the cars in interstate commerce over which the commission has full control.

XVII. In holding that the railroads cannot reasonably secure an adequate supply of fuel under the order of the commission, and that, therefore, the present method of obtaining railroad fuel by the use of assigned cars is justified although the general public is thus served at the expense of other shippers and consumers of coal.

XVIII. In holding that the commission in prescribing reasonable and nonpreferential rules of car distribution cannot treat upon the same basis as the other coal cars which the carrier owns or uses, cars owned by private shippers and used by the carrier.

XIX. In ignoring the primary duty of the carriers under the interstate commerce act at all times to furnish transportation including an adequate supply of cars.

XX. In not overruling the claim of coal shippers to the right in times of car shortage to the exclusive and preferential use of coal cars owned by them in possession of, operated, and otherwise treated by the several carriers as a part of their general operation and equipment.

XXI. In holding that rentals paid by carriers to the owners of private coal cars must be considered in determining rules by which carriers are to be governed in distributing coal cars.

XXII. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15) of section 1 of the interstate commerce act.

XXIII. In holding that the commission "has misconceived the purpose of paragraph (15) of section 1" of the interstate commerce act.

XXIV. (Error assigned by the United States only.) In failing to give full force and effect to paragraph (12) of section 1 of the interstate commerce act, and in holding "We find it, however, unnecessary to base our conclusions in the case upon the con-
1126 struction of paragraph (12) of section 1, although its legislative history in connection with the administrative history of the assigned car rule has a bearing upon the question of the reasonableness of the order of the commission which is before us."

Wherefore, defendants, and each of them, pray that the final order or decree of the district court, entered December fifteenth, 1915, be reversed, annulled, and set aside with directions that the permanent injunction shall be dissolved and the bill for injunction dismissed; and for such other and further order as may be appropriate.

GEORGE W. COLES,
United States Attorney, Eastern District of Pennsylvania.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

1127 **In United States District Court**

Order allowing appeal of United States and Interstate Commerce Commission

Filed Feb. 8, 1926

In the above-entitled cause United States of America and Interstate Commerce Commission, defendants, having made and filed their petition praying an apeal to the Supreme Court of the United States from the final order or decree of the district court, made and entered December fifteenth, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which the said order or decree was made and entered to the Supreme Court of the United Sattes.

VICTOR B. WOOLLEY,
United States Circuit Judge.

J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1128 **In United States District Court**

Praecipe for transcript of record

Filed Feb. 16, 1926

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and Interstate Commerce Commission and include therein, in the order given below, the following matter, viz:

1. Bill for injunction.
2. Exhibits to bill.
3. Answer of the United States.
4. Answer of the Interstate Commerce Commission.
5. Intervening petition of Pocahontas Operators' Association et al.
6. Answer of Pocahontas Operators' Association et al.
7. The following certified copies of reports and orders of the commission, viz:

Exhibit No. 15, No. 13896, In re Rules Governing Ratings of Coal Mines, etc., December 23, 1924, 95 I. C. C. 309, 384, report.

Exhibit No. 14, No. 12530, Assigned Cars for Bituminous Coal Mines, December 23, 1924, 93 I. C. C. 701, 754, report and order.

Exhibit No. 13, No. 12630, Assigned Cars for Bituminous Coal Mines, June 13, 1923, 60 I. C. C. 530, 569, report and order.

Exhibit No. 12. In re Assignment of Freight Cars, June 11, 1920, 57 I. C. C. 760-772, report and order.

Exhibit No. 11. No. 4966, In re Private Cars, July 31, 1918, 50 I. C. C. 652-718, report and order.

1129 Exhibit No. 16, No. 9284, Car Supply Investigation, January 18, 1917, 42 I. C. C. 657, 706, report and order.

Exhibit No. 9, No. 1383, Hillsdale Coal & Coke Co. v. Pennsylvania Railroad, March 7, 1910, 19 I. C. 356, report and order.

Exhibit No. 8, No. 1322, Rail & River Coal Co. v. Baltimore & Ohio. June 2, 1908, 14 I. C. C. 86, 87-97, report and order.

Exhibit No. 7, No. 1305, No. 1306, No. 1307, Royal Coal & Coke Co. v. Southern Railway Co., April 13, 1908, 13 I. C. C. 440, 441, 450, report and order.

Exhibit No. 6, No. 1294, 1295, 1317, Truer v. Chicago & Alton (2 other cases) April 13, 1908, 13 I. C. C. 451, 459, report and order.

Exhibit No. 5, No. 1033, Ruttle v. Pere Marquette, March 2, 1908, 13 I. C. C. 179, 186, report.

Exhibit No. 4, No. 1008, Railroad Commission of Ohio v. Hocking Valley, July 11, 1907, 12 I. C. C. 466, 486, report.

Exhibit No. 3, orders in No. 12530 of date, respectively. July 23, 1923, September 12, 1923, October 9, 1923, November 6, 1923, December 14, 1923, December 19, 1923, March 3, 1924, May 6, 1924, June 30, 1924, October 22, 1924, December 9, 1924 (or in lieu thereof any narrative agreed upon by the parties and/or approved by the court).

Exhibit No. 2, which consists of (a) order in No. 12530, March 22, 1921, one mimeograph page; (b) order in No. 13896, June 17, 1922, one page with 6 pages of rules attached (Exhibit A 5½ pages, and Exhibit B ½ page) (or in lieu thereof any narrative agreed upon by the parties and/or approved by the court).

8. Exhibit No. 1, certified copy of the transcript of the record of the evidence and proceedings before the Interstate Commerce Commission offered by the counsel for the petitioners (or in lieu thereof any narrative agreed upon by the parties and/or approved by the court).

9. Certified copies of the following annual reports of the commission (or in lieu thereof any narrative agreed upon by the parties and/or approved by the court):

Exhibit No. 16, 21st, 1907; December 23, 1907.

Exhibit No. 17, 34th, 1920; December 1, 1920.

Exhibit No. 18, 35th, 1921; December 1, 1921.

Exhibit No. 19, 36th, 1922; December 1, 1922.

Exhibit No. 20, 37th, 1923; December 1, 1923.

Exhibit No. 21, 38th, 1924; December 1, 1924.

1130 10. Order of final submission.

11. Opinion of the district court.

12. Final decree.

13. All journal entries in their appropriate order.
14. Petition for appeal.
15. Assignment of errors.
16. Order allowing appeal.
17. Praecipe for record.
18. Summons and severance.
19. Notice to the Attorney General of Pennsylvania.
20. Citation.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for Interstate Commerce Commission.

Service of the foregoing praecipe for record and the receipt of a copy thereof are hereby admitted and acknowledged this 11th day of February, 1926.

FRANK BERGEN,
WILLIAM C. SPEER,
Solicitors for Appellees.

1131 In United States District Court

No. 3317

[Title omitted.]

Notice of appeal

Filed Feb. 11, 1926

To the Honorable George W. Woodruff, Attorney General of the State of Pennsylvania:

You are hereby notified that the defendants, United States of America and Interstate Commerce Commission, have taken an appeal from the final order or decree of the district court, entered December 15, 1925, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. 221).

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of a copy of the within notice is hereby admitted and acknowledged this 8th day of February, 1926.

GEORGE W. WOODRUFF,
Attorney General of the State of Pennsylvania.

1132 **In United States District Court**

No. 3317.

[Title omitted.]

Summons and Severance.

Filed Feb. 10, 1926

To Pocahontas Operators' Association, an unincorporated voluntary association; Empire Coal & Coke Company, a corporation, and Pocahontas Fuel Company, Incorporated, a corporation:

You are hereby invited to join with the United States of America and the Interstate Commerce Commission in an appeal to the Supreme Court of the United States this day prosecuted from the final order or decree of the district court entered December 15, 1925, in the above-entitled cause in which you are intervenors.

In the event of your failure to join, the United States of America and Interstate Commerce Commission will prosecute the appeal for the reversal of the final order or decree of the district court without joining you.

This notice is seasonably given that you may have full opportunity to determine your own course with respect to an appeal.

February 8th, 1926.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
R. GRANVILLE CURRY,
Solicitor for the Commission.

Service of the foregoing summons and severance and the receipt of a copy thereof are hereby acknowledged this 8th day of February, 1926.

E. L. GREEVER,
Solicitor for the Foregoing Intervenors.

1133 [Citation in usual form showing service on Frank Bergen, filed Feb. 13, 1926, omitted in printing.]

1134 [Clerk's certificate to foregoing transcript omitted in printing.]

1135-1136 In United States District Court, Eastern District of Pennsylvania

In Equity No. ——

Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahontas Consolidated Coal Company, and Pennsylvania Coal & Coke Corporations, complainants, vs. United

States of America, defendant, and Interstate Commerce Commission, intervening defendant; The Central Pennsylvania Coal Producers' Association, and Pocahontas Operators' Association (unincorporated voluntary associations), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated corporations, intervenors

Petition for appeal by the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company (incorporated corporations)

Filed Feb. 8, 1926

Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company and Pocahontas Fuel Company (incorporated corporations), intervenors, feeling themselves aggrieved by the final order or decree of the district court made and entered December 15, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They rely upon the transcript of record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, which is to be transmitted to the Supreme Court of the United States upon the appeal herein of the United States and the Interstate Commerce Commission.

E. L. GREEVER,

Of Counsel for Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company and Pocahontas Fuel Company Incorporated Corporations.

GREEVER & GILLESPIE,

Of Counsel.

1137 In United States District Court

No. 3271

[Title omitted.]

Assignments of error by and on behalf of the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company and Pocahontas Fuel Company, Incorporated, corporations

The intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, now come,

by their counsel, and in connection with their petition for appeal file the following assignments of error on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December 15, 1925.

The District Court erred:

1. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

2. In not dismissing the bill for injunction for want of equity.

3. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

1138 4. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

5. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

6. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

7. In holding that "the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

8. In holding that "there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

9. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

10. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

11. In giving to the effect of the commission's order upon the plaintiffs, as found by the court, conclusive weight as against the 1139 effect thereof upon other shippers and upon the public, as found by the commission.

12. In holding that the advantage to the plaintiffs that they "may successfully maintain production," that the fact that they "have laid out large sums of money in supplying themselves with private cars, and that depriving them "of the use of such cars in time of coal shortage" constitute a justification of the undue prejudice to other shippers which the commission finds results from these facts.

13. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

14. In holding that "the right to the use of private cars" is not subordinate to the powers of Congress, and of the commission, to regulate interstate commerce.

15. In construing paragraph (3), paragraph (12), paragraph (14), and paragraph (15) of section 1, and paragraph (13), of section 15.

16. In holding that "in paragraph (15) their (private cars) use is excluded from the power conferred by Congress upon the commission to make direction with respect to car service."

17. In holding that the "valuable legal right in the ownership of private cars, in which sums of money amounting to millions of dollars have been invested by the plaintiffs, furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage," and in holding that fact, if it be a fact, material, if, as found by the commission, it results in an unduly preferential service by the railroads to the plaintiffs.

18. In failing to discriminate between the legal title of the plaintiffs in and to the cars, with which the commission has
1140 nothing to do, and the use of said cars in interstate commerce, over which the commission has full control.

19. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15), of section 1 of the act.

20. In holding that the railroads can not reasonably secure an adequate supply of fuel under the order of the commission and that the present method of obtaining railroad fuel by the use of assigned cars is justified, although the general public is thus served at the expense of other shippers and consumers of coal.

21. In failing to recognize the fact that "the right to the use of private cars," as found by the court, amounts to the setting apart for their exclusive use of a definite portion of the railroad's facilities, including tracks, terminals, motive power, and labor.

22. In holding that the references by the commission to the increased cost of production and losses to the producer of coal, resulting from the use of assigned and private cars by the plaintiffs, are anything more than statements of fact showing the injuries sustained by reason of the discrimination found by the commission to be caused by the existing assigned car rules, showing that the discrimination found is illegal, because it works injury and undue preference.

23. In holding that the order of the commission is void because, as the court construes it, privately owned cars might remain idle while otherwise plaintiffs could use them.

24. In ignoring the primary duty of the railroads to furnish an adequate car supply and in imposing upon shippers others than owners of private cars the entire burden of their failure to do so.

25. In holding "that the owners of private cars enjoy the use of a disproportionately large part of the facilities of the carriers
1141 is not discriminatory unless other shippers are thereby deprived of the use of those facilities, and that is not the case

unless there is a shortage of such facilities," for car shortages are shown to be caused always by such shortage of facilities somewhere, and the whole transportation facilities of the country must be taken into account and not simply those on the originating line in question.

26. In holding that the railroads have the right to assign railroad fuel cars beyond the pro rata allotment to which the mines to which they are assigned are entitled, thereby taking the property and property rights of other mines (by depriving them of their pro rata share of cars) without compensation.

27. In holding that the payment of compensation to the owners for the use by railroads of private cars does not place such cars in the same class as system cars, all devoted and subject to the service of the public.

28. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned car mines will result if the assigned car rule is abolished.

Wherefore the intervenors, and each of them, pray that the final order or decree of the district court entered December 15, 1925, be reversed, annulled, and set aside, with directions that the permanent injunction thereby awarded shall be dissolved and the bill for injunction dismissed; and for such other and further orders as may be appropriate.

GREEVER & GILLESPIE,
Attorneys for Intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, Corporations.

E. I. GREEVER, *Of Counsel.*

1142 In United States District Court

No. 3271

[Title omitted.]

Order allowing appeal of Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors.

Filed Feb. 9, 1926

In the above-entitled cause the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December 15, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty days from the date hereof, said intervenors relying upon the transcript of the record, proceedings and papers on which said order was made and entered, to be transmitted to the Supreme Court of the United States with the appeal of the United States and the Interstate Commerce Commission herein.

(Sgd.) VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1143 [Clerk's certificate to foregoing papers omitted in printing.]

1144–1145 In United States District Court, Eastern District of Pennsylvania

In Equity No. 3273

Bethlehem Steel Company, Bethlehem Mines Corporation, and Bethlehem Steel Corporation (corporations), petitioners; Illinois Steel Company, Carnegie Steel Company, American Steel and Wire Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, H. C. Frick Coke Company and United States Steel Corporation (corporations), intervenors; The Steel Company of Canada, Ltd., The Cleveland Cliffs Iron Company, and Perry Iron Company (corporations), intervenors; The Youngstown Sheet and Tube Company (corporation) intervenor, vs. United States of America, defendant, and Interstate Commerce Commission, intervening defendant, The Central Pennsylvania Coal Producers' Association, and Pocahontas Operators' Association (unincorporated voluntary associations), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated (corporations), intervenors.

Petition for appeal by the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations.

Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors, feeling themselves aggrieved by the final order or decree of the District Court made and entered December 15, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

They rely upon the transcript of record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, which is to be transmitted to the Supreme Court of the United States upon the appeal herein of the United States and the Interstate Commerce Commission.

E. L. GREEVER.

Of Counsel for Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Co., Incorporated, corporations.

GREEVER & GILLESPIE, *Counsel.*

1146 In United States District Court

No. 3273

[Title omitted.]

Assignment of errors by and on behalf of the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations

Filed Feb. 8, 1926

The intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, now come, by their counsel, and in connection with their petition for appeal file the following assignment of error on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December 15, 1926.

The District Court erred:

1. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

2. In not dismissing the bill for injunction for want of equity.

3. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

1147 4. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

5. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft coal

industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

6. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

7. In holding that "the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

8. In holding that "there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

9. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

10. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

11. In giving to the effect of the commission's order upon the plaintiffs, as found by the court, conclusive weight as against
1148 the effect thereof upon other shippers and upon the public, as found by the commission.

12. In holding that the advantage to the plaintiffs that they "may successfully maintain production," that the fact that they "have laid out large sums of money in supplying themselves with private cars, and that depriving them of the use of such cars in time of coal shortage" constitute a justification of the undue prejudice to other shippers which the commission finds results from these facts.

13. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

14. In holding that "the right to the use of private cars" is not subordinate to the powers of Congress, and of the commission, to regulate interstate commerce.

15. In construing paragraph (3), paragraph (12), paragraph (14), and paragraph (15), of section 1, and paragraph (13), of section 15.

16. In holding that "in paragraph (15) their (private cars) use is excluded from the power conferred by Congress upon the commission to make direction with respect to car service."

17. In holding that the "valuable legal right in the ownership of private cars, in which sums of money amounting to millions of dollars have been invested by the plaintiffs, furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage," and in holding that fact, if it be a fact, material, if, as found by the commission, it results in an unduly preferential service by the railroads to the plaintiffs.

18. In failing to discriminate between the legal title of the plaintiffs in and to the cars, with which the commission has
1149 nothing to do, and the use of said cars in interstate commerce, over which the commission has full control.

19. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15) of section 1 of the act.

20. In holding that the railroads can not reasonably secure an adequate supply of fuel under the order of the commission and that the present method of obtaining railroad fuel by the use of assigned cars is justified although the general public is thus served at the expense of other shippers and consumers of coal.

21. In failing to recognize the fact that "the right to the use of private cars," as found by the court, amounts to the setting apart for their exclusive use of a definite portion of the railroad's facilities, including tracks, terminals, motive power, and labor.

22. In holding that the references by the commission to the increased cost of production and losses to the producer of coal, resulting from the use of assigned and private cars by the plaintiffs, are anything more than statements of fact showing the injuries sustained by reason of the discrimination found by the commission to be caused by the existing assigned car rules, showing that the discrimination found is illegal because it works injury and undue preference.

23. In holding that the order of the commission is void because, as the court construes it, privately owned cars might remain idle while, otherwise, plaintiffs could use them.

24. In ignoring the primary duty of the railroads to furnish an adequate car supply, and in imposing upon shippers other than owners of private cars the entire burden of their failure to do so.

25. In holding "that the owners of private cars enjoy the use of a disproportionately large part of the facilities of the car-
1150 riers, is not discriminatory unless other shippers are thereby deprived of the use of those facilities, and that is not the case unless there is a shortage of such facilities," for car shortages are shown to be caused always by such shortage of facilities somewhere, and the whole transportation facilities of the country must be taken into account and not simply those on the originating line in question.

26. In holding that the railroads have the right to assign railroad fuel cars beyond the pro rata allotment to which the mines to which they are assigned are entitled, thereby taking the property and property rights of other mines (by depriving them of their pro rata share of cars) without compensation.

27. In holding that the payment of compensation to the owners for the use by railroads of private cars does not place such cars in the same class as system cars, all devoted and subject to the service of the public.

28. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned car mines will result if the assigned car rule is abolished.

Wherefore the interveners, and each of them, pray that the final order or decree of the District Court entered December 15, 1925, be reversed, annulled, and set aside, with directions that the permanent injunction thereby awarded shall be dissolved and the bill for injunction dismissed; and for such other and further order as may be appropriate.

GREEVER & GILLESPIE,
Attorneys for Intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, Corporations.
E. L. GREEVER, *of Counsel.*

1151 In United States District Court

No. 3273

[Title omitted.]

Order allowing appeal of Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors

Filed Feb. 9, 1926

In the above-entitled cause the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December 15, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty days from the date hereof, said intervenors relying upon the transcript of the record, proceedings, and papers on which said order was made and entered to be transmitted to the Supreme Court of the United States with the appeal of the United States and the Interstate Commerce Commission herein.

(Sgd.) VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1152 [Clerk's certificate to foregoing papers omitted in printing.]

1153–1154 **In United States District Court, Eastern Pennsylvania.**

No. 3275

Rainey-Wood Coke Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company, and Donner-Hanna Coke Corporation, corporations, complainants, vs. United States of America and Interstate Commerce Commission, defendants, the Central Pennsylvania Coal Producers' Association and Pocahontas Operators' Association (unincorporated voluntary associations); Empire Coal & Coke Company and Pocahontas Fuel Company, Incorporated, corporations, intervenors.

Petition for appeal by the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated (corporations).

Filed Feb. 8, 1926.

Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors, feeling themselves aggrieved by the final order or decree of the District Court made and entered December 15, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

They rely upon the transcript of record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, which is to be transmitted to the Supreme Court of the United States upon the appeal herein of the United States and the Interstate Commerce Commission.

E. L. GREEVER.

Of Counsel for Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, Corporations.

GREEVER & GILLESPIE,
Of Counsel.

1153 **In United States District Court**

No. 3275

[Title omitted.]

Assignment of errors by and on behalf of the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association) Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations

The intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, now come, by their counsel, and in connection with their petition for appeal file the following assignment of error on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December 15, 1925.

The District Court erred:

1. In suspending, annulling and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

2. In not dismissing the bill for injunction for want of equity.

3. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

1156 4. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

5. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

6. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

7. In holding that "the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

8. In holding that "there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

9. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

10. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the commission, without warrant of law, and null and void."

11. In giving to the effect of the commission's order upon the plaintiffs, as found by the court, conclusive weight as against
1157 the effect thereof upon other shippers and upon the public, as found by the commission.

12. In holding that the advantage to the plaintiffs that they "may successfully maintain production," that the fact that they "have laid out large sums of money in supplying themselves with private cars, and that depriving them "of the use of such cars in time of coal shortage" constitute a justification of the undue prejudice to other shippers which the commission finds results from these facts.

13. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

14. In holding that "the right to the use of private cars" is not subordinate to the powers of Congress, and of the commission, to regulate interstate commerce.

15. In construing paragraph (3), paragraph (12), paragraph (14), and paragraph (15), of section 1, and paragraph (13), of section 15.

16. In holding that "in paragraph (15) their (private cars) use is excluded from the power conferred by Congress upon the commission to make direction with respect to car service."

17. In holding that the "valuable legal right in the ownership of private cars, in which sums of money amounting to millions of dollars have been invested by the plaintiffs, furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage," and in holding that fact, if it be a fact, material, if, as found by the commission, it results in an unduly preferential service by the railroads to the plaintiffs.

18. In failing to discriminate between the legal title of the plaintiffs in and to the cars, with which the commission has
1158 nothing to do, and the use of said cars in interstate commerce, over which the commission has full control.

19. In failing to give full force and effect to paragraphs (11), (12), (13), (14), and (15), of section 1 of the act.

20. In holding that the railroads cannot reasonably secure an adequate supply of fuel under the order of the commission, and that the present method of obtaining railroad fuel by the use of assigned cars is justified although the general public is thus served at the expense of other shippers and consumers of coal.

21. In failing to recognize the fact that "the right to the use of private cars," as found by the court, amounts to the setting apart for their exclusive use of a definite portion of the railroad's facilities, including tracks, terminals, motive power, and labor.

22. In holding that the references by the commission to the increased cost of production and losses to the producer of coal, resulting from the use of assigned and private cars by the plaintiffs,

are anything more than statements of fact showing the injuries sustained by reason of the discrimination found by the commission to be caused by the existing assigned car rules, showing that the discrimination found is illegal because it works injury and undue preference.

23. In holding that the order of the commission is void because as the court construes it, privately owned cars might remain idle while, otherwise, plaintiffs could use them.

24. In ignoring the primary duty of the railroads to furnish an adequate car supply, and in imposing upon shippers other than owners of private cars the entire burden of their failure to do so.

25. In holding "that the owners of private cars enjoy the use of a disproportionately large part of the facilities of the carriers, 1159 is not discriminatory unless other shippers are thereby deprived of the use of those facilities, and that is not the case unless there is a shortage of such facilities," for car shortages are shown to be caused always by such shortage of facilities somewhere, and the whole transportation facilities of the country must be taken into account and not simply those on the originating line in question.

26. In holding that the railroads have the right to assign railroad fuel cars beyond the pro rata allotment to which the mines to which they are assigned are entitled, thereby taking the property and property rights of other mines (by depriving them of their pro rata share of cars) without compensation.

27. In holding that the payment of compensation to the owners for the use by railroads of private cars does not place such cars in the same class as system cars, all devoted and subject to the service of the public.

28. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned car mines will result if the assigned car rule is abolished.

Wherefore the intervenors, and each of them pray that the final order or decree of the District Court entered December 15, 1925, be reversed, annulled, and set aside, with directions that the permanent injunction thereby awarded shall be dissolved and the bill for injunction dismissed; and for such other and further order as may be appropriate.

GREEVER & GILLESPIE.

Attorneys for Intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company Incorporated, Corporations.

E. L. GREEVER, *Of Counsel.*

1160 In United States District Court

No. 3275

[Title omitted.]

Order allowing appeal of Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company and Pocahontas Fuel Company, Incorporated, Corporations, intervenors

Filed Feb. 9, 1926

In the above entitled cause, the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association) Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December 15, 1925, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of Court in such case made and provided:

It is ordered and decreed that the appeal be, and the name is hereby, allowed as prayed and made returnable within thirty days from the date hereof, said intervenors relying upon the transcript of the record, proceedings, and papers on which said order was made and entered, to be transmitted to the Supreme Court of the United States with the appeal of the United States and the Interstate Commerce Commission herein.

(Sgd.) VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1161 [Clerk's certificate to foregoing papers omitted in printing.]

1162–1163 In United States District Court, Eastern District of Pennsylvania

In Equity No.——. Public Service Electric and Gas Company (corporation), plaintiff, vs. United States of America and Interstate Commerce Commission, defendants; Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, Incorporated, corporations, intervenors.

Petition for appeal by the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated (corporations)

Filed Feb. 8, 1926

Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors, feeling themselves aggrieved by the final order or decree of the District Court made and entered December 15, 1925, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

They rely upon the transcript of record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, which is to be transmitted to the Supreme Court of the United States upon the appeal herein of the United States and the Interstate Commerce Commission.

E. L. Greever,
Of counsel for Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company and Pocahontas Fuel Company, Incorporated, Corporations.

Greever & Gillespie,
Of Counsel.

1164 In United States District Court

No. 3317

[Title omitted.]

Assignments of error by and on behalf of the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations

The intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, now

come, by their counsel, and in connection with their petition for appeal file the following assignment of error on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered December 15, 1925.

The District Court erred:

1. In suspending, annulling, and enjoining the commission's order of June 13, 1923, as affirmed by its further order of December 23, 1924.

2. In not dismissing the bill for injunction for want of equity.

3. In substituting its judgment for the judgment of the commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

1165 4. In holding that said order of June 13, 1923, as affirmed by said order of December 23, 1924, "is unjust and unreasonable and an unlawfully arbitrary exercise of power."

5. In holding that said order of June 13, 1923, as affirmed by said later order, "undertakes by indirection to regulate the soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the commission."

6. In holding that said order of June 13, 1923, as affirmed by said later order, "assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public."

7. In holding that "the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential."

8. In holding that "there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case."

9. In holding that said order of June 13, 1923, as affirmed by said later order, "is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars."

10. In holding that said order of June 13, 1923, as affirmed by said later order, is "beyond the authority of the Commission, without warrant of law, and null and void."

11. In giving to the effect of the commission's order upon the plaintiffs, as found by the court, conclusive weight as against

1166 the effect thereof upon other shippers and upon the public, as found by the commission.

12. In holding that the advantage to the plaintiffs that they "may successfully maintain production," that the fact that they "have laid out large sums of money in supplying themselves with private cars, and that depriving them "of the use of such cars in time of coal shortage" constitute a justification of the undue prejudice to other shippers which the commission finds results from these facts.

13. In holding that "the right to the use of private cars is clearly recognized by the law," in the sense and manner stated by the court.

14. In holding that "the right to the use of private cars" is not subordinate to the powers of Congress, and of the commission, to regulate interstate commerce.

15. In construing paragraph (3), paragraph (12), paragraph (14), and paragraph (15), of section 1, and paragraph (13), of section 15.

16. In holding that "in paragraph (15) their (private cars) use is excluded from the power conferred by Congress upon the Commission to make direction with respect to car service."

17. In holding that the "valuable legal right in the ownership of private cars, in which sums of money amounting to millions of dollars have been invested by the plaintiffs, furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage," and in holding that fact, if it be a fact, material, if, as found by the commission, it results in an unduly preferential service by the railroads to the plaintiffs.

18. In failing to discriminate between the legal title of the plaintiffs in and to the cars, with which the commission has
1167 nothing to do, and the use of said cars in interstate commerce, over which the commission has full control.

19. In failing to give full force and effect to paragraph (11), (12), (13), (14), and (15), of section 1 of the act.

20. In holding that the railroads cannot reasonably secure an adequate supply of fuel under the order of the commission, and that the present method of obtaining railroad fuel by the use of assigned cars is justified although the general public is thus served at the expense of other shippers and consumers of coal.

21. In failing to recognize the fact that "the right to the use of private cars," as found by the court, amounts to the setting apart for their exclusive use of a definite portion of the railroad's facilities, including tracks, terminals, motive power, and labor.

22. In holding that the reference by the commission to the increased cost of production and losses to the producer of coal, resulting from the use of assigned and private cars by the plaintiffs, are anything more than statements of fact showing the injuries sustained by reason of the discrimination found by the commission to be caused by the existing assigned car rules, showing that the discrimination found is illegal because it works injury and undue preference.

23. In holding that the order of the commission is void because as the court construes it, privately owned cars might remain idle while, otherwise, plaintiffs could use them.

24. In ignoring the primary duty of the railroads to furnish an adequate car supply, and in imposing upon shippers other than owners of private cars the entire burden of their failure to do so.

25. In holding "that the owners of private cars enjoy the use of a disproportionately large part of the facilities of the carriers,
1168 is not discriminatory unless other shippers are thereby de-

prived of the use of those facilities, and that is not the case unless there is a shortage of such facilities," for car shortages are shown to be caused always by such shortage of facilities somewhere, and the whole transportation facilities of the country must be taken into account and not simply those on the originating line in question.

26. In holding that the railroads have the right to assign railroad fuel cars beyond the pro rata allotment to which the mines to which they are assigned are entitled, thereby taking the property and property rights of other mines (by depriving them of their pro rata share of cars) without compensation.

27. In holding that the payment of compensation to the owners for the use by railroads of private cars does not place such cars in the same class as system cars, all devoted and subject to the service of the public.

28. In holding to be untenable the commission's finding that an increased pro rata allotment at unassigned-car mines will result if the assigned car rule is abolished.

Wherefore the intervenors, and each of them, pray that the final order or decree of the District Court entered December 15, 1925, be reversed, annulled, and set aside, with directions that the permanent injunction thereby awarded shall be dissolved and the bill for injunction dismissed; and for such other and further order as may be appropriate.

GREEVER & GILLESPIE,

Attorneys for Intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations.

E. L. GREEVER, *of Counsel.*

1169 In United States District Court

No. 3317

[Title omitted.]

Order allowing appeal of Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, intervenors

Filed Feb. 9, 1926

In the above entitled cause, the intervenors, Pocahontas Operators' Association (an unincorporated voluntary association), Empire Coal & Coke Company, and Pocahontas Fuel Company, Incorporated, corporations, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, made and entered December

15, 1925, and having also made and filed and assignment of errors and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, said intervenors relying upon the transcript of the record, proceedings and papers on which said order was made and entered, to be transmitted to the Supreme Court of the United States with the appeal of the United States and the Interstate Commerce Commission herein.

(Sgd.) VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
W. H. S. THOMSON,
United States District Judges.

1170 [Clerk's certificate to foregoing papers omitted in printing.]

1171–1191 [Omitted in printing.]

1192 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered July 11, 1907, in case No. 1008, The Railroad Commission of Ohio et al. v. The Hocking Valley Railway Company, and case No. 1009, The Railroad Commission of Ohio et al. v. The Wheeling & Lake Erie Railroad Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.]

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1193 Before the Interstate Commerce Commission. No. 1008. Railroad Commission of Ohio et al. v. Hocking Valley Railway Company. No. 1009. Railroad Commission of Ohio et al. v. Wheeling & Lake Erie Railroad Company

Submitted June 29, 1907. Decided July 11, 1907

W. H. Ellis, attorney-general of Ohio, H. B. Arnold, R. J. Mauck, and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKechan, and W. N. Duncan for defendants.

Report and order of the Commission

1194 Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines

upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called "private," cars devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Complaint alleges unjust discrimination against other coal operators along the lines of defendants, in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such "private" and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only
1195 so many of the system cars as are necessary when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

W. H. Ellis, attorney general of Ohio; H. B. Arnold, R. J. Mauck, and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan, and W. N. Duncan for defendants.

REPORT AND ORDER OF THE COMMISSION

CLARK, Commissioner:

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The attorney general of the State appeared for the complainants. Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly descriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway Companies, and that while it has not adequate equipment of its own it has loaned, leased, and furnished cars to the latter company.

In the complaint against the Wheeling & Lake Erie Railroad Company it is stated that certain so-called "private" cars, claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

Paragraph III of the complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad
1196 companies so sending the cars have contracts for the furnishing of fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies, not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that because of that threat and because of the fact that competing roads were not at that time so counting such cars in distribution, it ceased to count them; that on or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against

the mines to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned, and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent to those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the railroad commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which
1197 owns nearly all of the stock of the Sunday Creek Company and the Wheeling and Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake Erie Coal Company. It can not be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

Since this case was argued the complications have been relieved by the Railroad Commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tipple of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial portion of the year it has a large number of idle cars; for the greater

portion of the year it is able to provide all the cars needed, but for four or five months in the year it is unable to meet the maximum demand of shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business, the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated, favoritism in the sending of the Hocking Valley Railway's cars to the K. & M. road is alleged, on the ground that many mines of the Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The
1198 K. & M. is in substance and effect a part of the Hocking Valley system. In its annual report to this commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley system through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(a) System cars, which include cars owned by the defendant, or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

"(b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

"(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel

cars were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular coal companies, is involved. These are the cars included in class (c) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about $150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases, and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price
1199 advanced by the coal companies, which second lien car-trust certificates were accepted by the coal companies in return for their cash payments, and, by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies, the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of the mines of the coal companies. Assuming, therefore, that the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company. It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal Mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business and some question as to the jurisdiction of this commission is suggested. The testimony

shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense. In the case of the Steamer Daniel Ball v. U. S., 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

In the case of the Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S., 426, the court held—

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

1260 In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the commission and makes it its duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet

every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this commission has original jurisdiction of questions of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the commission has no power to regulate the distribution of cars, and in this connection reference is made to the commission's decision in the case of Mason v. C., R. I. & P. R. Co. 12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the commission, it has undoubted power and jurisdiction to deal with complaint that the practices of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the commission and that of a court of equity.

1201 In Johnson Coal Mining Co. v. Hocking Valley Ry. Co., 14 Ohio Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary, or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the distribution, to work his mines more economically, more nearly to their full capacity, and more steadily. He can therefore afford to sell the fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading

with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion of available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United States ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., in which the 1202 coal company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant, did not count the private cars, or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demand is so great that all the mines having individual cars require and get their full percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate-commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever.

"The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"These regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives, and are operated by the employees of the railroad company and must lessen the facilities in that respect of the independent operators. Indeed an objection of the railroad company to individual ownership of cars is that they require special switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate-commerce act. The mine operator would, in any state of the car supply, continue to get the exclusive use of his individual
1263 cars as before, but when the supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region.

* * * * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore and Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore & Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate commerce act would permit these

cars now the property of the railroad company to be taken out of its distributable car supply.

* * * * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car-supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of the exclusive use of their individual cars, but the individual cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they are not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Logan Coal Company v. Pennsylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the
1294 distribution. The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to discontinue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were so consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

"All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be performed consistently with this paramount requirement of equal treatment to all. * * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the

transportation of their produce as any other, and when a practice which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown, this enables the relator to ship somewhat more of its daily output than a competitor who only receives the use of company cars. * * * It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous-coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable to do, and it seems to me that when an operator elects to avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company. * * *

1285 "What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the

relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of Pennsylvania as to the propriety of counting the foreign railway fuel cars in the distribution of equipment are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of the act to regulate commerce and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using 'individual' or 'private cars' for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

It is to be noted that the recommendation of the commission refers to "private" or "individual" cars; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they were not intended, as seems to have been contemplated by the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars is
198 less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient

number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions which require carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assignment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all will be on an equality, and the effect can not be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In Rice, Robinson & Witherop v. W. N. Y. & P. R. Co., 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

1207 It is admitted that the cars so held under lease are devoted to the exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal-mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad

Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of $150,000 in cash, for which, in a comparatively short period, they received an equivalent amount of interest-bearing car trust certificates. Assuming that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

ORDER

Upon the foregoing report—

It is ordered, That the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation

1208 taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal; and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its propor-

tion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

1209 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report of the commission filed March 2, 1908, in case No. 1033, Henry Ruttle, Daniel Leonard, and David H. Crorey v. Pere Marquette Railroad Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1210 Before the Interstate Commerce Commission. No. 1033.
Henry Ruttle, Daniel Leonard, and David H. Crorey v. Pere Marquette Railroad Company

Submitted October 1, 1907. Decided March 2, 1908

Alexander B. Simonson and Robert M. Brownson for complainants.

Charles McPherson and Frederick W. Stevens for defendant.

Report of the commission

1211 1. While the right to use private cars may doubtless be denied to shippers by appropriate legislation, in the absence of a specific enactment to that effect the commission is not prepared to say that their use in itself is unlawful; but if their use results under a given set of circumstances in an unlawful advantage to their owners and an unlawful disadvantage to other shippers, a question is presented which under existing legislation is within the control of the commission and may be made the basis of such relief as the facts may justify.

2. Because of defendant's insufficient equipment a number of worn-out cars no longer serviceable for interstate movements were acquired and fitted up by certain shippers for the transportation of their hay from local points on the Port Austin division of defendant's line to junction points with other lines, where the hay was transferred to empty system cars and moved forward to eastern markets: *Held*, that defendant's course in stopping its own cars as well as the cars in its control of connecting carriers, at such junction points, there to be loaded with hay from the "private" cars, instead of sending them up the line to the loading points where all the shippers might share in their distribution, was to the detriment and at the expense of complainants and other independent dealers, and amounted to a denial to the complainants of the equal enjoyment of the facilities of defendant and was therefore an unlawful discrimination.

Alexander B. Simonson and Robert M. Brownson for complainants.

Charles McPherson and Frederick W. Stevens for defendant.

REPORT OF THE COMMISSION

HARLAN, Commissioner:

The Port Austin division of the defendant railroad company traverses that part of the State of Michigan that lies north of Lake St. Clair and south of Saginaw Bay and which, because of its conformation as it appears on the map, is sometimes referred to locally as the "thumb" district of the State. It is said to be one of the best hay-producing sections in the United States. Carsonville, where the complainants and other shippers of hay have built more or less extensive storage sheds, is about midway between Port Huron and Port Austin, and seems to be the most important shipping point in the district. But hay in bulk is also shipped to interstate markets from Berkshire, Sandusky, McGregor, Downington, Applegate, and other adjacent points on that division of the defendant's lines.

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Notwithstanding its very large production of hay, the business of buying and shipping that commodity has not progressed in a way to satisfy the anticipations of the hay dealers in the locality in question. This has been due primarily to the deficiencies of the defendant company in the matter of freight-car equipment. Its counsel admitted on the hearing that during the last four or five years it has not been able to furnish cars in sufficient numbers to move the traffic offered. The shortage seems to have been especially severe with the shippers of hay. Statements offered by complainants Ruttle and Crorey show a steadily diminishing number of carload shipments made by them during the last six or seven years. It is said that from October 1, 1906, until June 1, 1907, not a single empty system car was sent up to Carsonville for the movement of hay to interstate points. The only cars the complainants were able to obtain during that period were cars that had come into Carsonville loaded with general

merchandise consigned to persons doing business there. In one or two instances the hay shippers were able to get possession of an additional car by having their own men transfer its contents, billed to points beyond Carsonville, to other cars in the train, thus making it available for a return movement of hay.

The general situation has been further complicated by the anomalous use made by some dealers of the so-called private hay cars. This practice, which is of recent origin, has been encouraged and is now defended by the Pere Marquette Railroad Company on the theory that it results in moving out of the district a larger tonnage of hay than would otherwise reach the consuming markets; and undoubtedly it has increased the volume of the traffic of shippers who are able to and do use the private cars. But it is strongly urged by the complainants that the use of such cars by their competitors results in an unlawful discrimination, which, coupled with the general car shortage, has so far destroyed their opportunities to ship hay as to make it doubtful whether they can longer continue in business. Whether it is in law a discriminatory practice is a question of no small importance. It seems to have originated in 1904. A large shipper of hay conceived the plan of buying from an eastern road some old coal cars which, because of their light construction,
1213 were not suitable for service in the heavy trains now used on the through lines. At small expense they were equipped for the movement of hay and were then sent to the Port Austin division of the defendant company. Other shippers, quickly perceiving the advantages arising from their use, made arrangements at Chicago to rent old and worn-out stock and other cars that were no longer acceptable for interstate movements. After being fitted up for the hay traffic these cars were also sent to the lines of the defendant.

The cars so purchased or leased are referred to in this record as private cars. Because of their inferior construction and worn-out condition neither the defendant nor its connections will use them for through shipments. They are permitted to run only from Carsonville, and other local points on the Port Austin division of defendant's lines, to Port Huron, Toledo, and Saginaw. On reaching these junction points the hay is transferred to the regular equipment of the defendant or its connections, and is thus sent forward to eastern markets. By keeping them moving back and forth between the local shipping points and the junction points, the owners or lessees of the private cars are able to get a very rapid and effective service out of them. As the distance is only 38 miles to Port Huron the cars can be run there and back again to the shipping point in two or three days. There is some indication in the record that it not infrequently happens that the round trip can be made in one day, thus making the private car available for loading again on the same day and an early movement out on the following morning. Occasionally a train is made up consisting almost entirely of private cars. At the junction or transfer points the shippers who use private cars have storage sheds where the hay can be held, if necessary, until the

Grand Trunk at Port Huron, or the Pennsylvania or the defendant at Toledo, furnishes regular empty cars for taking it to eastern destinations. From the junction or transfer points the shipments go forward on the balance of the through rate, except when taken east by the Grand Trunk from Port Huron, in which event the local rates to and from the transfer point are applied.

While those who own or lease the private cars are thus getting their hay rapidly to the junction points, and thence to the consuming markets, in the empty system and foreign cars which are their provided for the further movement, the other dealers at the points of origin either receive no empty cars at all or are able to secure them in very limited numbers. Although such dealers may have their sheds full of hay waiting for cars, they are unable either to move it or safely to make additional purchases. On the other hand the users of the private cars, without incurring expense for storage sheds, can go into the same community, buy all the hay offered for sale, and
1214 at once move it out to the junction point and get it forwarded promptly to the markets. Private cars in large numbers are thus hauled back empty from the junctions to Carsonville and other loading points, while for months no empty system car was brought up the line for the use of the hay dealers who have no private cars. The empty system or foreign cars get no farther than the transfer points.

Two advantages result to the users of private cars from these conditions. The custom is established of paying the farmers for their hay when the shipment actually moves; and the farmers are willing to sacrifice something in the selling price in order to get their money promptly. The private-car owners therefore not only get prompt movement for their hay as soon as they buy it from the producers, but because of the prompt movement they are able to buy it at a less price than the dealers who have no private cars and whose shipments are therefore delayed for uncertain periods of time until system cars can be furnished. It is true that in addition to the cost of purchasing the cars, or to the monthly rental that must be paid by those who lease them only, there is some outlay in making the transfer of the hay at the junction points. These items of expense are avoided by shippers who use the system cars only, for such cars go through to destination without transfer. But this additional cost to the private-car shippers is probably more than absorbed in the lower price at which they are able to buy the hay from the producers; and as they use the private cars as warehouses they are not under the expense borne by other shippers of maintaining warehouses at the shipping points. In view also of their larger and quicker sales the private-car owners can doubtless do business successfully on a narrower margin of profit. Although there are only four such dealers in the district, they shipped out 65 per cent of the hay during the season of 1907.

Such is the general trend of the testimony offered by the complainants. On the part of the defendant attention was called to

its rules governing the distribution of cars, which provide, among other things, that "the cars owned or leased by shippers must be counted in as their share of available equipment." Although it is said by one witness for the complainants that the private-car owners get their full quota of system cars in addition to their own private cars, this is denied by the defendant. And as indicating the strict enforcement of the rule, the defendant showed, by way of illustration, a record of 71 carloads of hay shipped out of the thumb district by the McMorran Milling Company between October 5, 1906, and June 19, 1907, of which only one carload went forward to the junction point in a car belonging to the defendant; the remaining 70 carloads went out of the district in the private cars of the McMorran Company.

1215 That the tendency of such a rule is good when there are system cars to distribute is undoubted. But the rule does not and lawfully can not operate to give to the independent shippers the use of the private cars that belong to others; and therefore when there are no system cars at the loading points to distribute the rule is wholly ineffectual; the independent shippers get no cars, while the owners of the private cars have them always at hand promptly to move such hay as they can purchase. Without offending the terms of the rule in any respect, the private cars may be kept running back and forth to and from the junction points. There those who own or lease them get all the empty system cars they need to carry their hay to the markets; while the other dealers waiting for empty cars at the loading points get none at all. When there are a few cars available at the loading points for distribution, the small proportion of them allotted to the complainants is of little value in their close competition with the owners of the private cars, all of whose requirements in the way of equipment are fully met at the transfer points. The fact that the complainants get their full share of cars at the loading points modifies only in a small degree the disadvantage under which they labor in not participating in the distribution of the cars that are put at the sole disposition of the private car owners at the transfer points. The course of the defendant in setting cars at the transfer points for the use of the private car owners, instead of taking them up the line to the loading point for the use of all the shippers, is no less unfair to the complainants and the other independent dealers than it would be if the discrimination in the distribution occurred at the loading points. The defendant's practice in that connection simply transfers the place of doing the wrong from the loading points to the transfer points. Of the 70 carloads of hay referred to the record shows that 63.38 per cent was transferred at Port Huron to system cars or to foreign cars under the control of the defendant, all of which could doubtless have been sent up its line 38 miles to the loading points for equal and fair distribution among all the hay shippers, instead of being stopped at the junction point for the sole use of a few parti-

cular shippers who were able to bring hay to that point in their private cars.

But it is contended that the handling of the traffic with the aid of the private cars in the manner described adds to the defendant's equipment and thus indirectly benefits shippers who do not use private cars, because, under the rule for car distribution heretofore mentioned, additional system cars that otherwise would go to the owners of the private cars are put at the service of the independent shippers. It is also insisted, as heretofore stated, that because of the private cars a larger tonnage of hay is moved out of the dis-
1216 trict than would be possible in any other way. This is probably true. But that fact does not satisfy the demands of the law if it results in an unlawful advantage to some of the shippers at the expense of other shippers in the district. The characteristic and most salutary feature of this legislation is that it assures to all shippers under like circumstances the equal enjoyment on equal terms of the facilities and services of interstate carriers. And so even though this community as a whole may have received a larger benefit from such use of private cars than it otherwise could, that can not excuse or justify a practice that disregards the rights or destroys the opportunity or prejudices the business of the individual shipper, and gives undue advantages to his competitors.

Much of the hay carried to Port Huron in private cars at the time in question was there transferred and went forward to destination over the Grand Trunk Railway in Grand Trunk cars. But this was an outlet that was not enjoyed by the complainants or the other so-called independent shippers. They had no cars with which to carry their hay to Port Huron. The few Grand Trunk cars that were brought up to Carsonville were especially carded or manifested to particular shippers. They were not available to hay dealers generally. The reason for this, as stated by the defendant, is that the Grand Trunk was unwilling to permit its cars to leave its own rails. It is not unusual for carriers to do what they can to keep control of their own equipment, especially when traffic is moving in large volume. But they are always anxious to accept traffic when they have cars to move it; and if the Grand Trunk Railway was willing to consign its cars to particular shippers up the line of the defendant, it is altogether probable, with a proper guaranty by the defendant of their prompt return loaded to its rails, that it would then have been willing and would now be willing to send cars up the line to Carsonville for the use of the hay shippers in general. The defendant by demanding such assurances from its connections at Toledo was able at this same time successfully to move the potato crop of the district to eastern markets. A large number of its cars were specially assigned for that traffic and the agreement by connecting lines to return them promptly to the defendant's rails was fully respected by them. By making such an arrangement with the Grand Trunk Railway for participating in moving the hay crop, the defendant, of course, would have had a haul of only 38 miles instead of the longer haul to

Toledo and the still longer haul to Suspension Bridge, and would have received less revenues than it actually did. But it would have fulfilled its obligation to these shippers to move their hay to the markets with reasonable promptness. Whatever rates were lawfully applicable through the Port Huron gateway—whether local
1217 rates as stated by the defendant, or through rates as seem to be indicated by the records of the Commission—the owners of the private cars took full advantage of that route, and doubtless the independent shippers would have been glad to do so had the opportunity offered. But for all practicable purposes that route was closed to the independent shippers.

The contention of the complainants is that the private cars should be required to go through to destination or that their use should be prohibited altogether. The record shows that their condition is such as to make it unsafe and therefore improper to require them to be hauled through to destination. And no sufficient reasons have been suggested for holding that the use of such cars in itself is unlawful. Most of the early charters granted in this country were framed upon the theory that railroads were highways in the ordinary and usual sense of that word, and that any shipper who could provide himself with a locomotive and the necessary cars had the right to travel and transport his property over them, subject only to the payment of reasonable tolls for the privilege. This theory has long ceased to be of practical importance in this country. The lack of economy to shippers in owning and running their own cars and locomotives soon made it evident that the railroad companies themselves must provide equipment and operate their roads for the shipping public. Under various State statutes subsequently enacted and under the act to regulate commerce as amended, it has, in fact, now become the affirmative duty of railroad companies to conduct the transportation over their respective lines, and to supply the necessary cars and locomotives for safely and promptly moving the traffic offered. The only remnant that survives of the original conception of railroads as public highways in that sense is the use of private cars, which some shippers insist upon for special reasons connected with their business and other shippers resort to in order to supplement the deficient equipment of the carriers. But while the right to use private cars may doubtless be denied to shippers by appropriate legislation, we are not prepared, in the absence of a specific enactment to that effect, to say that their use is in itself unlawful. Whether under a given set of circumstances their use results in an unlawful advantage to their owners and in an unlawful disadvantage to others is another question, which under existing legislation is clearly under the control of the commission, and may be made the basis of such relief as the facts in any particular case may justify. When considered from this point of view, the defendant's course in stopping its own cars at the junction points as well as the cars under

its control of connecting carriers, and there putting them at the disposition of the owners of the private cars instead of sending them up the Port Austin division for equal distribution among
1218 all the dealers, amounted in our judgment, as we understand the record, to a denial to the complainants of an equal enjoyment of the facilities of the defendant and therefore was an unlawful discrimination. The hay traffic of the thumb district originates at the loading points and is no proper part of the commerce of Port Huron, which is a mere gateway for the traffic to the eastern markets. Both the independent dealers and the private car owners are conducting their hay shipping business at the shipping points; it is one and the same traffic, whether done by one class of shippers or by another. And manifestly all the cars, whether those belonging to the defendant or those in its control and belonging to connecting lines, that are used in transporting the hay produced in and shipped out of the district, ought to be distributed upon some plan that will give to all the individual shippers a fair distributive share.

We shall make no order at this time governing the distribution of cars for the future in moving the hay traffic from this district. It would be well, however, for the defendant at once to arrange a conference with a representative committee of hay shippers along its Port Austin division, embracing those who lease and own the so-called private cars, and those who do not, including the complainants, with the view to arriving at some further understanding with respect to the distribution of cars for the coming hay shipping season on a more equitable basis. In this connection the fact that the defendant specially assigns a large number of cars for moving the potato crop while assigning none at all to the special service of moving the hay crop must not be overlooked. Unless some plan can be agreed upon and reported to the commission by April 20, 1908, the commission will take the matter up for further consideration and will enter whatever order may be required to secure a more equitable distribution of equipment for this traffic. It is understood that the road and other property of the defendant company while not actually are nevertheless technically still in the possession of a receiver. He is a party defendant in this proceeding and will be included as such in any order that may be hereafter entered herein.

1219 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered April 13, 1908, in case No. 1294, Glenn W. Traer, receiver of the Illinois Collieries Company, v. Chicago & Alton Railroad Company; case No. 1295, Same v. Chicago, Peoria & St. Louis Railway Company of Illinois; and case

No. 1317, Same v. Illinois Central Railroad Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1220 No. 1294. Glenn W. Traer, Receiver of the Illinois Collieries Company, v. Chicago & Alton Railroad Company, No. 1295. Same v. Chicago, Peoria & St. Louis Railway Company of Illinois. No. 1317. Same v. Illinois Central Railroad Company

Submitted March 11, 1908. Decided April 13, 1908

1. In establishing systems of car distribution, defendants have given the mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the systems established each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive share of the mines to which they are assigned. Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners.

2. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

1221 3. Fuel is necessary and essential to the operation of a railroad, and the right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded; but if a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities in such contract and have it upheld on the ground of compelling necessity.

4. In these cases the commission is of the opinion that as to the privately owned or leased cars and the foreign railway fuel cars the rule laid down in Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep., 398, should apply, and that cars used by defendants upon their own lines for transportation of their own necessary

fuel supply may be given in any numbers to the mine or mines from which such fuel supply is received, but if such mine or mines also ship commercial coal the fuel cars so supplied must be counted against the mine or mines.

Cassoday & Butler for complainant.

Winston, Payne, Strawn & Shaw, and Garrad B. Winston for Chicago & Alton Railroad Company.

W. S. Kenyon for Illinois Central Railroad Company.

Philip Barton Warren for Chicago, Peoria & St. Louis Railway Company of Illinois.

REPORT OF THE COMMISSION

CLARK, Commissioner:

The complaint in each of the above cases was filed by the Illinois Collieries Company, but upon the appointment of the receiver for said company he was, upon petition, substituted as complainant in each case. The subject of the complaints is practically the same in all three cases, and they were heard together upon record made in No. 1294 and are to be disposed of in one report.

The Illinois Collieries Company is a corporation with principal place of business at Chicago, Ill. It is engaged in mining and selling bituminous coal, and makes interstate shipments thereof over the lines of the defendants. Its mines are in Illinois and are located upon the lines of the Chicago & Alton Railroad Company and of the Chicago, Peoria & St. Louis Railway Company of Illinois. Its mine nearest to the line of the Illinois Central Railroad Company is 200 feet from the latter's right of way, and is served by that defendant through switching arrangements with the Wabash Railroad Company. Numerous mines of the character of those owned by the Illinois Collieries Company are located upon the lines of the respective defendants.

The several defendants have contracts for their own fuel supply with certain of the mines located on their respective lines.
1222 Some of the mines have contracts to furnish foreign railways with coal and others have contracts with purchasers who furnish private cars for the transportation of such coal. Complainant sells its coal almost wholly in the open market, and each of its mines is dependent upon the defendant upon whose line it is located for cars to transport the output thereof. Complainant has no contracts for furnishing fuel coal to the defendants, and, except in a few instances, has not used foreign railway fuel cars nor private cars during the time covered by the complaints.

In establishing a system of car distribution the defendants have given the several mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the system established, each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel

cars, foreign railway fuel cars, and private cars are not charged against the distributive shares of the mines to which they are assigned. After the assignment of such cars to said mines, each is given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all. This permits these mines to ship a greater portion of their daily output than mines having the same tonnage rating but that do not have fuel contracts with the defendants nor the use of private or foreign railway fuel cars.

Complainant contends that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners; that the increased allotment to such mines makes a corresponding decrease in the cars to which complainant and the other mine owners would otherwise be entitled, and that their interstate shipments of coal are to the extent of that decrease thus restricted.

The failure to count the defendants' fuel cars against the mines to which they are delivered was not specified in the complaint against the Illinois Central Railroad Company, but in brief and on argument it says that the question is one of great importance to it. At the time of the filing of this complaint the circuit court of the United States for the northern district of Illinois had enjoined the said defendant from counting foreign railway fuel cars and private cars against the mines to which they were assigned. The question of the commission's jurisdiction of discriminatory practices in the light of the decision of the Supreme Court in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S., 426, was decided by the commission in Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep., 398.

1223 Defendants in their briefs concede that the prior holding of the commission, in Railroad Commission of Ohio v. H. V. Ry. Co., supra, eliminates the question of counting private cars and foreign railway fuel cars in the distribution, and that the question of counting the cars used for the defendants' own fuel is really the only question presented for determination. Defendants claim that the necessity for fuel with which to operate their lines gives them the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply permits them to make advantageous contracts and to get their coal at a lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

The Chicago & Alton Railroad Company has 360 hopper-bottomed gondola cars which it says are used solely for its own fuel, and which, because no shipper on its line has trestle from which to unload them, are not only inconvenient but impracticable for commercial use.

Complainant in these cases presents the following illustration, and argues that such a practice is unjustly discriminatory: A carrier

offers to contract with two mines for 500 tons of coal [illegible] day, dividing the amount equally between them. The mines are each of 1,000 tons daily capacity. One mine accepts the contract, the other does not, and in turn the carrier gives the remaining portion of the contract to the first mine. The carrier has thus offered to the two mines a market created by itself; one mine has accepted the market so offered and the other has not. This leaves one mine with 500 tons of coal sold in a special market and 500 tons to find a common market, and the other has 1,000 tons to find a common market. The handling of the 500 tons sold to the carrier by the contracting mine requires the equipment of the railroad. The carrier can furnish cars for but 1,000 tons. It says it must have 500 tons for its necessary use, and sends the cars for that amount to the contracting mine. This leaves available cars of 500 tons capacity, in the distribution of which it says that it will not count the 500 tons that have been given to the contracting mine, but that it will divide the remaining cars on the basis of 1,000 tons rating for each mine, thus permitting the contracting mine to dispose of three-fourths of its output and the other only one-fourth.

The carrier says it is justified in doing this because the first mine has made a contract with it to furnish it coal, which it must of necessity have in order to operate, and as an inducement to such mine to make this contract it does not charge to that mine the number of cars necessary to handle the 500 tons sold to the carrier, and, in further consideration, permits said mine to enjoy the same pro-
1224 portional share in the remaining cars available for distribution as if it had not sold any coal to the carrier.

If two mines of equal daily capacity are located on the line of a carrier, and one sells its entire daily output locally and the other does not sell any locally, but its entire output must find some other market, it is clear that, although the capacities of the mines are the same, and each would be entitled to the same percentage of cars if they were both offering their output to the company, the one would not be entitled to a rating because it would tender no coal and the other would be entitled to the equipment of the company for that day, and if it was sufficient to move its output, both mines would be on an equality, so far as the selling of their output is concerned. But if one mine sells one-half of its output locally and the other none at all, and the carrier has only enough cars to transport one-half the combined output of the two, it would be unfair for the carrier to rate the mine selling one-half of its output locally at the same tonnage as the other mine and give to it one-half of the cars that it had on a given day.

If a carrier assigns to or uses for the transportation of its own fuel supply only such part of its equipment as is reasonably necessary therefor, it may be asked what difference can it make to the shippers along its line whether those cars go to the mine or mines owned by the carrier or to one or more mines with which the carrier has contracts for coal? The shipper who has no fuel contract

answers this by saying that when one mine has such contract with carrier and is furnished cars under it without having its distributive share of cars for commercial shipments reduced thereby, such mine is given an advantage over its competitor that has no contract with the carrier, because it is enabled to work its mine more regularly and thus to keep its property in a more efficient condition—to retain its employees and thus to operate more economically and to sell its output more advantageously in the commercial market. To this the carrier and the shipper who has fuel contract with the carrier retort: "You were given an opportunity to take a contract upon the same terms and declined to do so."

Products offered a carrier for shipment in a given locality are usually tendered because the volume produced is in excess of that consumed in the local market. The object of the transportation requested is to get the surplus to a market of consumption. It is the duty of the carrier, so far as it is in its power, to furnish the means of getting that output either from the mills or from the mines to the market.

That it is the duty of a common carrier to furnish means of transportation and to furnish them alike for all that are similarly situated the commission has repeatedly held: Richmond Elevator Co.
1225 v. P. M. R. R. Co., 10 I. C. C. Rep. 629; Eaton v. C. H. & D. Ry. Co., 11 I. C. C. Rep. 619; Railroad Commission of Ohio v. H. V. Ry. Co., supra; Powhatan Coal & Coke Co. v. N. & W. Ry. Co., 13 I. C. C. Rep. 69.

One industry may not be built up by granting to it transportation privileges which are denied to and which work an unreasonable disadvantage against another industry. All must bear their just proportion, according to circumstances and conditions, of any disadvantage that may arise from insufficiency of facilities resulting from causes which are beyond the carrier's control.

It appears that the defendant, the Chicago & Alton Railroad Company, applied its system of car distribution and ratings thereunder to three mines not located on its lines, but which it reached through switching connections with other railways. Said defendant had no fuel contracts with them, but during the months of September, October, and November, 1907, it furnished cars to said mines under their respective ratings for the transportation of approximately 130,080 tons of commercial coal. Defendant, the Illinois Central Railroad Company's line, does not reach complainant's mines at Litchfield, although it gives such mines a rating. It does not appear that it furnished cars to these mines.

Unless for the purpose of securing its own fuel supply it is neither right nor proper for a carrier to send its cars for loading at mines that are not located upon its line at times when it could only supply the demand for cars from mines that are located upon its line, perhaps wholly dependent upon it for both cars and transportation. Such a practice necessarily intensifies an existing inability on part

of the carrier to meet the demands of shippers who are dependent upon it and who have a right to rely upon its performance of its duty as a common carrier, and it curtails the already-restricted opportunities of the mines that can secure neither cars nor transportation from any other carrier.

The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. In fact, its first duty is to such shippers. See Memphis Freight Bureau v. Ft. S. & W. R. R. Co., 13 I. C. C. Rep. 1. It may not be compelled to nor may it voluntarily divert its equipment from its own line to shippers on another line when to do so would deprive its local shippers of needed equipment. A carrier may, of course, send its equipment from its line for the things that are necessary and essential for its own operation. This right arises from considerations of public policy which recognize the duty of a carrier to operate its line, and the diverting of its equipment in that instance is predicated on necessity. It is not an inherent right that is grounded on
1926 private contract. The limit of this right is measured by the extent of the necessity; it can not go beyond that.

Fuel is as necessary and essential to the operation of a railroad as are rails, roadbed, and other equipment. Without it a carrier could serve no one. The right of a carrier to own mines for its fuel supply is conceded in the law. The right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded, as must also the right to utilize its facilities in providing and transporting those materials and supplies that are essential to the operation of its lines. In fact, a carrier must arrange in advance, by ownership or contract, for its fuel supply. Otherwise its ability to perform its functions would be as uncertain as its fuel supply. For that reason a carrier may contract for its fuel supply, and in so far as the contract is not opposed to public policy or in conflict with the statutes or the rules of law announced by the courts, it must be regarded as any other private contract. Any contract of lawful subject-matter, regardless of the character of the parties, is made with reference to the law applicable thereto, and all principles of public policy involved therein, the statutes and the decisions of the courts relating thereto become as effectually a part of the contract as if they had been expressly referred to therein. If a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the act to regulate commerce or to the decisions of the courts or is opposed to public policy, they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier can not inject illegalities into such contract and have it upheld on the ground of compelling necessity. Public policy has never permitted a carrier to procure its operating necessities by means of illegal contracts. The substance may be legally subject to contract, but the form of that contract must not be subject to illegal infirmities.

A carrier may lawfully get the coal that it needs so long as it does not violate the rights of or fail in its duty to the public. It must make this contract as it must make all others, keeping in view its duty to perform its public functions and to avoid injury or damage to its shippers by reason of unjust discrimination, undue preference, or unreasonable disadvantage growing out of such contract or the performance thereof. If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof. As before observed, however, this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel. But if a carrier had a contract for
1227 more cars of fuel per day than it needed, neither such contract nor considerations of public policy which recognize the public necessity for fuel would justify it during a period of car shortage in using its equipment for a superfluous supply when such equipment was demanded and needed by the shippers and the public.

It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers. Generally speaking, this inability, so far as coal shipments are concerned, prevails during about four or five months of the winter season, when the demand for coal is greatest and the prices of coal the highest. During the other portion of the year carriers generally have a surplus of idle coal cars.

In Railroad Commission of Ohio v. H. V. Ry. Co., supra, the commission held that privately owned or leased cars and cars of foreign railways sent for foreign railway fuel must be assigned to the parties by whom owned or leased, or to whom consigned, but that all such cars must be counted against the distributive shares of such parties. Any other holding would open the door to unjust discrimination between shippers of commercial coal, for it must be remembered that cars of foreign railway fuel are commercial shipments in so far as the carrier transporting them for another carrier is concerned. Such shipments may not be given discriminatory or preferential rates.

The transportation by a carrier of its own fuel over its own lines presents a somewhat different question. Conditions and circumstances vary in different localities, but where a carrier contracts for fuel coal with certain mines located on its lines and served by it, which also compete with other mines similarly located, in the sale of commercial coal, the carrier may not unjustly discriminate in favor of the mine that accepts its proffered contract and thus work undue prejudice against the mine that does not accept such contract. Conceding fully the right of the carrier to use its equipment for the purpose of securing its own fuel supply, even though shippers at the same time desire the use of that equipment, and conceding the right of the carrier to secure its fuel supply either from mines which it owns or those whose entire output it purchases, we are led to the

conclusion that where a carrier purchases a portion of the output of a mine which is competing with other mines on its lines in commercial markets it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In these cases we think that as to privately owned or leased cars and foreign railway fuel cars the rule laid down in Railroad Commission of Ohio v. H. V. Ry. Co., supera, should apply. We
1228 think that the Chicago & Alton Railroad Company has a right to confine the hopper-bottomed cars referred to to the hauling of its fuel supply, but that they, together with all other cars used by the defendants upon their own lines for transportation of their own fuel supply, should be counted against the distributive share of the mine or mines to which given, except in cases where the carrier owns or purchases the entire output of the mine for its fuel supply.

An order will be entered accordingly.

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ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of April, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

No. 1294. Glenn W. Traer, receiver of the Illinois Collieries Company, v. Chicago & Alton Railroad Company. No. 1295. Same v. Chicago, Peoria & St. Louis Railway Company of Illinois. No. 1317. Same v. Illinois Central Railroad Company

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Com-
1230 pany of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years there-

after to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars.

1231 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered April 13, 1908, in Case No. 1305, Royal Coal & Coke Company v. Southern Railway Company, Case No. 1306, Tennessee Coal Company v. Southern Railway Company, and Case No. 1307, Minersville Coal Company v. Southern Railway Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the and the remainder was considered the rating of such mines on

[SEAL.]

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1232 **No. 1305. Royal Coal & Coke Company v. Southern Railway Company. No. 1306. Tennessee Coal Company v. Southern Railway Company. No. 1307. Minersville Coal Company v. Southern Railway Company**

Submitted February 29, 1908. Decided April 13, 1908.

The defendant, the Southern Railway Company, on its Coster or Knoxville division, had in effect a plan of distribution of coal cars during periods of car shortage whereby the available cars were divided between the mines furnishing the defendant with less than their total output for its fuel supply and the purely commercial mines, on the following basis:

The tonnage of the cars for railway fuel supplied to the fuel-contract mines was deducted from the rated capacities of such mines, and the remainder was considered the rating of such mines on which they shared with the commercial mines in a pro rata distribution of the car tonnage available for commercial shipments.

This plan of car distribution applied only to cars assigned for the carrier's own fuel supply; there were no individual cars or cars owned by others than the carrier itself on that division; and the defendant treated foreign railway fuel cars as though they had been commercial cars, i. e., the billing of such cars was respected, but they were charged against the mines to which they were assigned as commercial cars.

1233 The petitions did not complain of the defendant's method of rating the various mines; but the evidence introduced to prove the discriminations effected by the above plan of car distribution involved testimony showing the progressively decreasing relative ratings for the commercial mines that resulted from the greater relative car supply allotted by the defendant to the railway fuel contract mines. The plan of car distribution, however, is in these cases the subject-matter of the complaint, not the mine ratings.

Upon the facts shown, it is held:

1. That the plan of car distribution practiced by the defendant was unduly preferential of the fuel-contract mines, and resulted in an unreasonable disadvantage to the purely commercial mines.

2. That in the matter of car distribution, where there is an inadequate supply of coal cars, the only regulation or practice in respect to the transportation of coal from the mines that is just, fair, and reasonable to be hereafter followed is to allow to each mine its fair and just proportion of the coal cars, estimated upon its justly ascertained capacity, and without regard to whether the mine furnishes partly fuel coal and partly commercial coal, or commercial coal only.

3. That the carrier should publish, or post for convenient inspection, at frequent and regular intervals, the ratings of the various mines and the car tonnage received by them within the period covered by the report; in cases where commercial mines have received more or less than their equitable pro rata of the car tonnage during

any particular period, the overplus or shortage for such mines should be adjusted, as far as possible, within the period next succeeding, and such correction should be shown in the subsequent reports.

4. That the carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part thereof less than the whole; and it is entitled to get its fuel first. If, however, a mine contracts to furnish only a part of its output to the carrier for fuel, and if the filling of its contract with the carrier calls for its full pro rata of cars, or more, then it should receive no other cars for commercial shipments. If such a mine in filling its contract to supply fuel coal does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars.

5. That the occupation, the user, and the consequent reduction of the available equipment of the carrier is the vital matter in all plans of car distribution in times of shortage.

6. That the money damages alleged by the complainants, the Tennessee Coal Company and the Minersville Coal Company, were not proven with sufficient certainty to warrant the commission in making any award, even if it had jurisdiction in such cases.

Charles F. Diggs and William A. Pless for complainants.

Claudian B. Northrop for defendant.

George S. Patterson and George V. Massey in support of the rule of the Pennsylvania Railroad Company.

REPORT OF THE COMMISSION

COCKRELL, Commissioner:

The complaints in these three cases were filed October 14, 1907.

In case No. 1305 the Royal Coal & Coke Company, a corporation existing under the laws of the State of Tennessee, after describing the location of its mines in the Coal Creek district, in Ten-
1234 nessee, on the lines of the defendant carrier, the Southern Railway Company, and having set forth that the defendant is a common carrier subject to the act to regulate commerce, alleged: (1) The interstate character of the complainant's shipments of coal; (2) the insufficiency of the defendant's equipment of coal cars—commonly called a car shortage; and (3) the duty of the defendant under the circumstances to distribute its coal-car equipment pro rata among all the coal mines requiring the use thereof without undue discrimination in favor of any mine or mines and without unjust prejudice to the rights of the complainant.

The complaint charges that the plan of car distribution adopted by the defendant is unjust and unreasonable, discriminatory, and unduly preferential to the fuel contract mines, and unduly prejudicial to the mines selling commercial coal. This plan, briefly stated, is as follows:

The tonnage of the cars for defendant's railway fuel supplied to the fuel contract mines was deducted from the rated capacities of

such mines and the remainder was considered the rating of these mines on which they shared with purely commercial mines in the pro rata distribution of cars available for commercial shipments. This plan is illustrated by complainants as follows:

"Two mines, designated as A and B, are rated by the defendant at a daily loading capacity of 100 cars each. On a given day there are but 100 cars available for both mines. Mine A loads 50 of these cars as so-called 'arbitrary,' or 'preferential,' or 'railway company fuel cars' for defendant, while mine B loads none. Said 50 cars are subtracted from mine A's original loading capacity of 100 cars daily, leaving the remaining available 50 cars for commercial coal to be divided between the two mines on the basis of the new rating of 50 cars daily capacity for mine A and 100 cars daily capacity for mine B, thereby giving to mine B 33⅓ cars and to mine A 16⅔ cars of said 50 cars, which, added to the 50 cars loaded for company fuel, gives mine A 66⅔ cars and mine B 33⅓ cars out of the original 100 available cars."

Case No. 1306, wherein the Tennessee Coal Company is complainant, is in substance the same as the case of the Royal Coal & Coke Company, but asks damages in the sum of $5,000.

In case No. 1307 the Minersville Coal Company follows the allegations of the preceding cases, but claims damages in the sum of $10,000.

The Southern Railway Company, the defendant, filed answer to each of the complainants November 6, 1907, in which it admitted the interstate character of complainants' shipments, and as to the insufficiency of equipment, stated that "at certain seasons of the year it has an ample supply of coal cars to meet the demands of all
1235 shippers of coal on its line, while at other seasons of the year there is a shortage of coal cars"; and that "it makes every effort to distribute and divide the cars among its various shippers on all its divisions in accordance with a fair and just pro rata, and without any unjust, undue, or unreasonable discrimination in any manner whatsoever"; that this result is accomplished by the method it pursues, which it illustrated as follows:

Let it be assumed that a mine has a daily capacity of 1,000 tons, or 25 cars averaging 40 tons each. Let it be assumed further that such a mine has a fuel contract with the Southern Railway Company under which it is obliged to furnish a minimum of 400 tons, or 10 cars per day.

The shipment of this coal for fuel purposes reduces the capacity of this mine for commercial shipments to 600 tons per day instead of 1,000 tons, and it is given its pro rata share of equipment available for commercial shipments on this basis, and this applies to all of the fuel mines in the Coal Creek district.

At the hearings at Knoxville, Tenn., the three cases, by stipulation of counsel, were consolidated and heard together. The cases were argued at Washington, D. C., orally and by briefs. The facts in this case are substantially as follows:

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The complainants are corporations mining bituminous coal in the Coal Creek district of Tennessee, on the Coster or Knoxville division of the Southern Railway Company, and shipping coal over the rails of the defendant into the Carolinas and Georgia. There has been a shortage of coal cars on this division of the Southern Railway for a number of years. At no time during the last three years has there been a full supply of coal cars on that division except during the month of July, 1907. This complete supply of equipment covered the entire month and was used as a means of rerating the mines on the basis of actual shipments. There is practically no controversy as to the plan of distributing cars in cases of shortage as hereinbefore stated and illustrated by both the complainants and the defendant. The effect of the rerating of the mines on the basis of actual shipments during the month of July, 1907, was to raise the relative percentage of the ratings of the fuel mines and to lower the relative percentage of the ratings of the purely commercial mines, which was brought about in this way. Prior to the month of July no mine had a full supply of cars, but the fuel mines were allotted a larger total proportion of the available car supply than fell to the purely commercial mines and had steadier work to give their operatives, and labor naturally drifted to the fuel mines, leaving the commercial mines somewhat crippled for men.

The mines shipping railway fuel do get a larger proportion of the total cars available, and because of this they enter into fuel contracts with the carrier at a price somewhat lower than the average market price of coal. As a result they secure greater steadiness of
1256 work for their miners, a larger total output, certainly of part of their income, and a chance to obtain at least a part of the commercial prices for their output after supplying the company fuel.

The Southern Railway buys its fuel from the various coal-mining districts along its own line and along the lines of other roads, at mine prices ranging from 72 cents to $1.10 per ton, and consumes about one-half of the total output of the Coal Creek district; the price paid by it in this district recently has been not above $1.10 per ton, which is the highest price it pays for any coal at the mines. It buys such coal under contracts for various periods for so many tons per month, and its contracts are not materially different from those of other large consumers of coal. There are no private or individual cars belonging in this coal district. The defendant respects the billing of cars of other railroads which are sent into these mines for loading with coal for railroad use, counts them against the mines to which they are sent as commercial cars, and does with these foreign fuel cars what the complainants contend it should do with respect to its own fuel cars.

The defendant's plan of car distribution as affecting its rating of the mines produces a result unduly prejudicial and disadvantageous to the purely commercial mines in that they are progressively re-

stricted in the allotment of cars. In view of the facts the question arises, What would be a reasonable and just plan of car distribution in cases of car shortage?

This commission, in its report to Congress in response to the joint resolution approved March 7, 1906, on the subject of railroad discriminations and monopolies in coal and oil, on page 68, referring to the section of country in which the investigation had been made, discussed the question of car distribution generally and said:

The prevailing rule is that cars in which fuel coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel-coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.

The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation and gave him an advantage over a competitor who has no order for fuel coal.

This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed.

1237 On page 69 the Pennsylvania Railroad Company's plan was set forth as follows:

Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated.

The commission expressed its opinion thereon, and said:

And this would seem to abolish the assigned cars on that road for its fuel supply and also for fuel supply of foreign roads, and the same circular covers individual cars; but where the individual cars and the assigned cars exceed the rated capacity of a mine the order mentioned does not relieve the unfair condition.

On page 80 of this report the commission said:

Another source of discrimination in the system of car distribution on the several railroads is the assignment of cars to certain operations

for fuel coal or company coal without charging such cars against the pro rata distributive shares in the equipment of the road. In other words, treating such assigned cars as arbitrary cars and also treating cars from other roads for fuel coal as arbitrary cars and not counting them against the percentage to which the operator receiving them is entitled. This method of distributing cars interferes with and to a certain extent nullifies any fair system of distribution which may be put into effect, creates inequalities and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel coal and the market price thereof.

On page 81 the commission recommended:

That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private" cars for the handling of coal traffic; and further that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time.

In the circuit court for the eastern district of Pennsylvania, the Logan Coal Company, which owned 150 private or individual coal cars, filed a petition December 17, 1906, for mandamus against the Pennsylvania Railroad Company, to require the defendant to cease from subjecting the company to undue, unjust, or unreasonable discrimination in the distribution of cars under the rule of the Pennsylvania Railroad quoted above. Answer was filed and the case was heard and decided by Holland, district judge, July 1, 1907, 154 Fed. Rep., 497. The court said:

The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and, in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company and the engines and the train crews and the moving facil-
1238 ities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same, and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company. * * *

What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these

cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator.

That case merely held that granting the rule to be as set forth in the petition, the relator, which owned individual cars, was far from being unduly discriminated against, or unduly prejudiced by said rule, in fact had an advantage over its competitors, and that, therefore, the petition for mandamus should be dismissed. It does not approve the Pennsylvania Railroad Company's plan of distribution, but condemns it by saying:

The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata, to shippers desiring their use along the line, upon a basis giving each equal facilities, with the other.

This commission did not indorse or commend the plan of the Pennsylvania Railroad Company, nor was that plan approved by Judge Holland in the Logan coal case.

On January 16, 1907, the United States ex rel. Pitcairn Coal Company, which owned no individual coal cars, filed a petition in the circuit court for the district of Maryland for a mandamus to require the Baltimore & Ohio Railroad Company et al. to cease from subjecting the relator and other coal companies on the Monongah division to undue and unreasonable discrimination in the shipping and transportation of coal. The case was decided by Morris, district judge, June 11, 1907, 154 Fed. Rep., 108. The relator had charged that, whenever in any district the supply of cars was insufficient to fill all orders, cars were supposed to be distributed, and the Baltimore & Ohio Railroad Company alleged that it had distributed such cars on a percentage basis to all the mines in such district, but in the distribution of cars on a percentage basis, before distribution was made, certain arbitrary assignments of cars were made, reducing the total number of cars to be distributed.

In discussing this case the court said:

The purchases of coal at the mines by the Baltimore & Ohio Railroad Company itself amount to about 5,000,000 tons a year; the consumption being greatest in the winter time, when the car shortage is most felt. This coal is delivered by the mines from which it is purchased directly onto the engines, tenders, and company's 1239 cars, and does not pay freight, and does not enter into interstate commerce. It is consumed by the Baltimore & Ohio Railroad in operating its own lines. It is naturally purchased from the larger mines, having coal of the grade and price used, because they have the capacity to furnish daily the large quantity daily required by the railroad, but the coal so sold is not counted in the shipments on which the percentage rating is based.

This statement of the facts in the Pitcairn case does not apply in these cases against the Southern Railway Company, because it is conceded that even the company's fuel supply bought at the mines in Tennessee is largely hauled to, stored, and used in the States of North and South Carolina; it does enter into interstate commerce. Again, the Southern Railway Company does count its own fuel coal in ascertaining the ratings of the various mines in the Coster division, and even if defendant's own fuel were not shipped to interstate points its plan of car distribution would interfere with and affect interstate shipments of commercial coal.

The Pitcairn cases, like the Logan case, was a petition for mandamus, and was based upon a plan of car distribution, but these are the only points of similarity: The Pitcairn Company owned no individual cars, the Logan Company did; the Pitcairn Company was adjudged "entitled to a peremptory writ requiring the Baltimore & Ohio Railroad Company, in cases of car shortage, in distributing the pro rata shares of the general coal-car equipment of the railroad company according to the percentage to which each mine is entitled, to include in the available car supply as the basis of the calculation the individual cars of mine operators regularly used on the Baltimore & Ohio Railroad, not intending, however, to give to the relator, or those in like situation with him, in any event the use at any time of individual cars to the exclusive use of which other mine operators are entitled."

In the case of the Railroad Commission of Ohio et al. v. Hocking Valley Railway Company et al., 12 I. C. C. Rep., 398, this commission said:

The total of the foreign railway fuel cars, the private cars, and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

The railroads must have fuel; they are entitled, and indeed required by law, to take all proper and just measures to assure the regularity and certainty of their fuel supply; but in securing
1240 such supply they are not justified either in beating down the price of coal by means of plans of car distribution or in penal-

izing mines that refuse to sell fuel coal by lowered mine ratings or lessened car supply.

The carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part of a mine's output less than the whole, and it is entitled to get its fuel coal first, for without fuel it can not haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large; but in all its acts it must deal even-handed justice in the matter of car distribution as in the matter of rates. If a mine contracts to furnish only a part of its output to the railroad for fuel, and if the filling of its contract with the railroad calls for its full pro rata of cars, or more, then it should not receive other cars for commercial shipments. If such a mine in filling its contract to supply fuel coal to the railroad does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars.

We are clearly of opinion that in the matter of car distribution, where there is an inadequate supply of coal cars, the only regulation or practice in respect to the transportation of coal from the mines that is just, fair, and reasonable to be hereafter followed is to allot to each mine its fair and just proportion of the coal cars estimated upon its justly ascertained capacity and without regard to whether the mine furnishes partly fuel coal and partly commercial coal, or commercial coal only.

Two of the complainants, the Tennessee Coal Company in docket 1306, and the Minersville Coal Company in docket 1307, claim damages. A great deal of time was consumed by the complainants in attempting to show that if they had been supplied with all the cars they needed, and if they had had sufficient laborers, and if they had sold all the coal so mined and shipped at about the average mine price for that period, then they would have made a profit on a certain number of supposed tons of coal equal to the difference between the said average mine price per ton and the estimated cost of producing the coal. But the testimony as to what would have been the cost of producing the coal, making all the assumptions enumerated above, is too indefinite, as it is based upon a cost to the operator excluding fixed charges as having been paid by the coal which, during the period, was actually shipped. The testimony is not positive nor direct, but is inferential, vaguely indefinite, and altogether lacking in certainty, and, without considering the question of our jurisdiction to make an order for reparation in such cases, does not justify this commission in making an award of damages to either company.

The conclusions of the commission are that the plan of distribution of cars by the defendant in cases of car shortage gives an undue and unreasonable preference and advantage to mines furnishing it with company fuel when the fuel contract calls for less than the total output of the mine, and subjects the purely commercial mines to an undue and unreasonable prejudice and disadvantage in that their pro rata shares of the coal-car equipment of

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the defendant are not only absolutely reduced in the daily allotment of available cars, but their relative ratings based on actual shipments in comparison with the fuel-furnishing mines of the Coal Creek group are also progressively reduced by reason of their inability to get their full share of cars; and that the only reasonable and just plan of car distribution is for the carrier to consider and count its own fuel cars in the same manner as foreign fuel cars are considered and counted, and that the defendant should be required to cease and desist from its present plan of car distribution, and within a reasonable time put in force the plan of car distribution indicated. The defendant should continue its present practice in the matter of the publicity of ratings and provide full and fair ratings of the capacities of the mines of the respective groups, publishing at regular intervals the ratings and car tonnage received by the mines within the period covered by the report. In cases where commercial mines have received more or less than their equitable pro rata of the car tonnage during any particular period the overplus or shortage for such mines should be adjusted, as far as possible, within the period next succeeding, and such correction should be shown in the subsequent reports.

No reparation should be allowed to any of the complainants.

After these cases had been fully argued the Pennsylvania Railroad Company, by its general counsel, asked to be heard with respect to the rule of that carrier referred to above. Permission to file a brief herein was granted and the brief filed.

The Pennsylvania Railroad Company, in its brief, does not discuss any decision of the courts or of this commission concerning the matters in issue, but its whole argument is based upon a statement that the fuel coal sold by the operator to the carrier at the mine is carried thence by the carrier for its own benefit and not for the benefit of the operator. In other words, the operator in selling fuel coal to the carrier makes a purely local sale, the ultimate destination of the commodity thereafter being at the will of the carrier, and the mine operator not being a shipper at all with respect to the fuel coal delivered by him to the railroad.

This argument is ingenious, but far from convincing. If it proves anything it proves too much. Commercial coal is usually sold f. o. b. at the mines, and the routing and freight charges thereon assumed by the purchasers. Would the Pennsylvania Railroad Company contend that the tonnage of such shipments should not be
1242 charged against the pro rata shares of car tonnage to which such mines are entitled? In both cases the available equipment of the carrier is used and the number of cars that can be furnished other shippers proportionately reduced.

Again, the argument proves too much, for if followed to its logical conclusion it would result in the condemnation of the very rule in support of which it is offered. The rule of the Pennsylvania Railroad is that: "The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading" railroad

fuel supply " will be the rated capacity on which all other cars "—that is, for commercial shipments — " will be prorated."

But why make such computation at all? If the contention now made in the brief of the Pennsylvania Railroad Company be true, such reduction of the rated capacity of the fuel contract mines is unfair to them. The cars should be assigned arbitrarily and without deduction from the rated capacity of the mines. The mere statement of the result of the argument refutes it. The fact of the matter is, however, that the occupation, the user, and the consequent reduction of the available equipment of the road is the vital matter in all cases of car distribution in times of shortage, and whether the cars are used for fuel supply or for commercial shipments they should be furnished the mines as hereinbefore set forth.

An order in accordance herewith will issue.

1243 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A. D. 1908

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

No. 1305. Royal Coal & Coke Company v. Southern Railway Company. No. 1306. Tennessee Coal Company v. Southern Railway Company. No. 1307. Minersville Coal Company v. Southern Railway Company

These cases being at issue upon complaints and answers on file, having been duly heard and submitted by the parties, full investigation of the matters and things herein involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Southern Railway Company, be, and it is hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least
1244 two years thereafter to abstain, from maintaining and enforcing the present practice or regulation, with respect to the distribution of coal cars in force on its Coster or Knoxville division, whereby the tonnage of the cars for defendant's railway fuel supplied to the fuel contract mines is deducted from the rated capacities of said mines, and the remainder is considered the new rating of such mines on which to share with the commercial mines in a pro rata distribution of the car tonnage available for commercial shipments.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before the 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation, during periods of car shortage in the

matter of car distribution of allotting to each mine its fair and just proportion of coal cars estimated upon its justly ascertained capacity and without regard to whether the mine furnishes partly fuel coal and partly commercial coal, or commercial coal only.

1245 INTERSTATE COMMERCE COMMISSION, WASHINGTON

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered June 2, 1908, in Case No. 1322, Rail & River Coal Company v. Baltimore & Ohio Railroad Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 29th day of May, A. D. 1925.

[SEAL.] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

1246 No. 1322. Rail & River Coal Company v. Baltimore & Ohio Railroad Company

Submitted April 11, 1908. Decided June 2, 1908.

1. The commission has jurisdiction of complaints involving the practices and regulations of interstate carriers in respect to the distribution of coal cars. Section 15 of the act is to be read in the widest possible sense; it brings within the jurisdiction of the commission all the regulations and practices of carriers under which they offer their services to the shipping public, and conduct their transportation.

2. Any regulation or practice that withdraws from a shipper the equal opportunity of taking advantage of the rates offered by a carrier is a regulation or practice "affecting rates," within the meaning of that phrase as used in section 15.

3. The principles announced in Railroad Commission of Ohio v. Hocking Valley Ry. Co., 12 I. C. C. Rep., 398, in regard to the distribution of private coal cars and foreign railway fuel cars, adhered to and reaffirmed with a reference to the obvious relation between a shortage in cars and an insufficiency of motive power, sidings, train crews, and other facilities which usually accompany a car shortage.

4. As a mere matter of law and in the absence of a definite showing based on actual experience a system of rating mines that takes into consideration both physical and commercial capacity can not be said to be discriminatory and unlawful. A rule permitting the owner of several mines to "pool" or group all his percentage cars at one of them can not be condemned as unlawful merely on hypothetical grounds unsupported by proof of discriminatory results.

H. B. Arnold for complainant.

Hugh L. Bond, jr., John G. Wilson, W. A. Parker, and F. A. Durban for defendant.

REPORT OF THE COMMISSION

HARLAN, Commissioner:

A preliminary question of jurisdiction must first be disposed of before the other questions of fact and law presented by this record may properly be considered. The complainant alleges that the operation of the defendant's rules and regulations governing the distribution of coal cars among the various coal mining districts
1247 on its lines results in giving to some of the districts a less than a just proportion of available cars; and that, as applied to the distribution of cars allotted to the particular district in which the complainant is mining coal, the rules and regulations give an undue preference to some of the operators in that district and create an unlawful discrimination against others. The complaint therefore prays that these regulations and practices may be declared to be unlawful and that the defendant may be required by appropriate order to adopt a plan that will yield more equitable results. In its answer the defendant, while denying any inequality and unfairness in the distribution, raises the jurisdictional question by pleading that such matters are not within the scope of the regulative authority of the commission.

The point arises upon the first paragraph of section 15 of the amended act to regulate commerce. Stripping the clause of unnecessary words and eliminating from it all matter not essential to this inquiry, the language upon which the argument of the defendant is based will stand out more clearly and the question will more readily be apprehended. The clause will then read as follows:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made * * * it shall be of the opinion that any of the rates * * * demanded * * * by any common carrier * * * for the transportation of persons or property * * * or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate * * * thereafter * * * to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation * * * and shall conform to the regulation or practice so prescribed."

The contention of the defendant is that its regulations and practices with respect to the distribution of coal cars among the various mines on its lines are not regulations or practices "affecting rates," and it therefore denies the authority of the commission to intervene between it and its coal shippers with a view to controlling and reforming the manner in which the distribution is made. Its counsel says:

"The law confers no power to make any order with reference to any regulation or practice of the carrier not affecting rates. Regulations as to car distribution do not affect rates, and the commission has, therefore, no power to prescribe what regulation or practice shall be followed with regard thereto."

The point is not altogether a new one. It has been pleaded in other cases although not seriously insisted upon in argument.
1248 But in this proceeding it is earnestly urged upon our attention by the defendant as decisive of the controversy and of the right of the commission to enter an order. The question is one of very large importance. If the numerous and varied regulations and practices of carriers which enter so vitally into questions of transportation do not "affect rates," in the sense attributed by counsel for the defendant to that phrase, and therefore lie outside the jurisdiction of the commission, our power to protect the shipping public against abuses is much less extensive than has generally been understood. There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, when the volume of his traffic is compared with that of a competitor, his business may be encouraged and built up, while the business of the competitor may be destroyed, if the commission has no authority to intervene on his behalf. That there is need of such authority will appear from an examination of the published reports of proceedings in which the commission has found just occasion to exercise it.

The power upon complaint made to deal with unjust, preferential, and discriminatory regulations and practices of carriers was clearly vested in the commission under section 15 of the act as it stood prior to the amendatory act of June 29, 1906. Whether or not it still exists under section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of the enactment, and then by examining the various provisions by which the intent and purpose are sought to be made effective. The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers. That principle appears throughout the act, but nowhere more clearly than in sections 2 and 3. The former assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter assures to them an equality in the

opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity to use the facilities of carriers would fall far short
1249 of the general object sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. And when we approach the consideration of any special provision in the act, this understanding of its general scope and purpose must not be lost sight of. As was said by Chief Justice Marshall in The Durousseau v. United States, 6 Cranch, 307, 314:

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

But, while keeping in mind the general intent and spirit of the act, we are by no means to be understood as indicating that our power to deal with undue preferences and unlawful discriminations, when accomplished by carriers through unjust regulations and practices, rests upon implication; or that it is necessary by implication to inject into section 15 explanatory words that are not embraced within its text. The language of that provision is entirely sufficient in itself to enable the commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort to ingenuity in construction or to rest the argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general objects and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration. After having vested in the commission the power to redress wrongs arising out of unreasonable and unjust rates, we are not ready to accept the view that the Congress has contented itself with a mere admonition in the law against the great wrongs that may be done against shippers through unjust regulations and practices. That as counsel contends is exactly what has happened. Although Congress has declared such practices to be unlawful, coun-

sel insists that it has omitted to give us the power to correct
1250 them. Setting aside as beyond the reach of the commission the great body of rules, regulations, and practices of carriers that have to do with transportation, he says:

"Examples of regulations affecting rates are those fixing maximum and minimum carload weights and that contained in the fourth clause of the uniform bill of lading which provides that all property transported shall be subject to necessary cooperage and baling at the owner's cost."

The maximum or minimum weight of a carload is not something affecting the rate, but is in fact a part of the rate, a factor which is just as essential to a correct statement of the rates as is the rate per 100 pounds itself. Nor do cooperage and baling effect the rate as such. They are simply special services performed by the carrier in transit when it is necessary to protect the shipment from damage or loss. Such services neither increase nor diminish the rate, but are charges entirely apart from the rate. While no other examples of rules or practices affecting rates are vouchsafed us by counsel to illustrate his conception of the meaning of that phrase, apparently he construes it as referring to rules or practices which in some way increase or diminish the amount of freight charges that the shipper must pay on a shipment.

The text itself does not justify that construction of the provision in question. It will be observed that the clause divides itself naturally into two parts; it authorizes the commission, first, to consider the wrong alleged and then to apply the remedy. If it shall be of the opinion after a full hearing that the regulation or practice complained of is unreasonable and unjust, the commission may remedy the wrong by prescribing a just and reasonable regulation or practice thereafter to be followed by the carrier. In the first part of the provision reference is made to regulations or practices "affecting rate"; the remedy offered by the provision consists in the prescribing by the commission of a just and reasonable regulation or practice with respect to "transportation." While there is here some contradiction in the words used, we do not understand that there is any contradiction in the real substance of the clause or in its meaning. Each part of the clause has a necessary relation to the other parts, and the words "regulations" and "practices" as used in both parts must necessarily be used in the same sense. If they are not so used it is difficult to see how a wrongful regulation or practice "affecting rates," in the sense of affecting the amount of the freight charges on a shipment, could ordinarily be cured by the substitution, as the clause now under consideration provides, of a just or reasonable regulation or practice in respect to "transportation." Obviously the
1251 two phrases refer to the same kind of regulations and practices, namely, the regulations and practices under which the transportation of interstate carriers is conducted. When both phrases are considered together and the whole clause is read in the light of the great purposes underlying the act, there is little difficulty

in reaching the conclusion that the words "any regulations or practices whatsoever * * * affecting such rates" are used synonymously with the words "regulation or practice in respect to such transportation"; and that both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation. We find no difficulty in holding, under section 15 of the amended act, that ample authority is vested in the commission to deal with the undue preferences and unlawful discriminations forbidden under sections 2 and 3 and elsewhere in the act, regardless of the form of the rule, regulation, or practice under which such wrongs may be perpetrated.

Having disposed of the defendant's contention with respect to the question of jurisdiction, we come now to a consideration of the merits of the controversy. The first complaint made of the defendant's rules regulating the distribution of coal cars is that they do not provide that private cars belonging to individual operators shall be charged against their respective percentages, but permit them to be received by the individual mines in addition to the system cars which they are respectively entitled to in the general distribution. The same complaint is made with respect to what are ordinarily referred to as foreign railway fuel cars that are sent into the mining districts on the lines of the defendant by connecting lines, and are billed or manifested to particular mines with which the connecting carrier has made arrangements for securing the coal required for its own use. Under the defendant's rules these cars are delivered to the operator to whom they are consigned or manifested, without being charged against his percentage in the general distribution. And these practices the complainants insist are discriminatory in their results and therefore unlawful. These questions have been presented and elaborately argued before the commission in other proceedings, and have had exhaustive and careful consideration. They will not, therefore, be further considered in connection with this complaint. It will suffice to say, in accordance with the announcement made in Railroad Commission of Ohio v. Hocking Valley Ry. Co., 12 I. C. C. Rep. 398, that the view of the commission is that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them is unlawful and that such operators are not entitled in the general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars. A like ruling must be made with
1252 respect to foreign railway fuel cars. As to the cars used by the defendant to secure its own supply of railway fuel no point is made in the complaint and no discussion was had on the argument. We shall therefore take no action with respect to such equipment. The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their

owners, and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating. And that principle must control the defendant's course in the future with respect to such cars. It may be well, however, at this time to say for the general information of those interested in such matters that in this proceeding, as well as in other proceedings that have come before the commission, too little stress has been laid upon the very obvious relation between a shortage in cars and an insufficiency in motive power, in sidings, in tracks, in train crews, and other facilities necessary to the movement of traffic. A shortage of cars on a particular line does not mean that the supply of cars of that carrier has been diminished in number, but only that the volume of traffic offered exceeds the capacity of its available equipment to move it. A shortage in cars usually, if not invariably, is accompanied by a shortage in some one or more of the other facilities of the carrier. When it has not enough coal cars, it usually has not enough locomotives and other facilities to meet the demands of its coal shippers. That was the case in the Hocking Valley case, supra, and in this record sufficient testimony of that tenor appears to lend support to the disposition here made of that portion of the complaint. But this element in a shortage situation must not be overlooked by litigants who complain of the methods of carriers in the distribution of their equipment. Its importance is very clear. The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car.

1253 When any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the commission has said on those questions in its formal decisions.

In support of the allegation that system cars are arbitrarily allotted to certain operators without regard to their percentage rating, the complainant's proof was very meager. The right of a carrier to make such arbitrary allowances for the purpose of enabling the

owner of a mine reasonably to develop it, so as to put it in a condition to operate and make shipments, has been recognized, and we see no grounds for disturbing the right in this case. But any arbitrary allowance of cars made to an operator on other grounds should be closely scrutinized, and is an unlawful discrimination unless justified by special conditions. Without going into the details of the record in this connection, it will suffice to say that the defendant must adjust its practices in that respect in accordance with these well-defined principles. We shall expect no less of it with respect to the allegation that there has been discrimination in the distribution of cars between the several mining districts on its lines. There is very little specific testimony in the record to support this contention, but enough appears to suggest that the matter should be carefully reexamined by the defendant with a view to a more perfect apportionment of its equipment between the several districts. A fixed rule governing the distribution of cars among various districts presents a difficult problem. But we do not regard it as a difficult matter to arrive at some method that will have due regard to transportation conditions and at the same time will produce reasonably equitable results. On both these questions we shall make no order for the present, the record, as we understand it, not disclosing a sufficient basis for definite action.

The matter most discussed on the hearing as well as upon the argument was the method adopted by the defendant in rating mines for the purpose of establishing the percentage of available car equipment to which they are respectively entitled in the daily distribution of cars during those periods when the demand for coal cars exceeds the supply. In this respect the basis of distribution long in force on the lines of the defendant differs from that adopted by other carriers whose methods for distributing cars have come before us upon formal complaint. In 1902 the defendant established a percentage basis consisting of two principal factors, (a) the physical capacity of the mine, and (b) the commercial capacity. The
1254 physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed. This in substance is the method generally adopted in arriving at the physical capacity of mines. But the defendant takes into consideration also what is referred to in the record as the commercial capacity of the mine, that is to say, the actual requirements of a mine for cars as tested by actual shipments made by the mine. This factor is arrived at by taking the volume of shipments made by the mine during a period of free car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years

In figuring the actual shipments made by a mine during these two free car periods, all its shipments are included except the shipments of fuel coal to the defendant company. These three factors, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and divided by three. The result is the capacity basis for determining the percentage of available cars that a particular mine is entitled to receive during percentage periods.

This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only. The physical capacity basis is already well understood. The objection found by the defendant in that system was much like the defect condemned by the Commission in Powhatan Coal & Coke Co. v. Norfolk & Western Ry. Co., 13 I. C. C. Rep. 69. In that case it appeared that the percentage rating of mines on the Norfolk & Western was based upon the number of coke ovens that had been erected by the respective operators. Many of the mines had erected coke ovens largely in excess of their requirements and solely for the purpose of increasing their percentages. The record showed that in the whole district but 52 per cent of the ovens that had been built were in actual operation. The ruling of the commission was that the mere number of ovens erected by a particular mine did not fairly measure its relative rights in the distribution of cars. In an examination of the situation on its lines, the defendant observed a like tendency. For the purpose of increasing their car percentage, the operators were developing the physical capacity of their mines
1255 beyond their actual selling capacity. This was an economic waste for which the system adopted by the defendant was intended as a partial cure. Ratings based upon commercial capacity only are used on some lines and are built up on what is called the "surprise" test. Without previous notice a carrier for three or four days will supply a mine with all the cars that it can use, and in this way a test is made of its actual requirements. The defect in this system was that in some way the mine owner would learn that a test was about to be made and could thus prepare for it. The system in force on the lines of the defendant combines these two theories of distribution. By taking the physical capacity as one factor and as the other factor the commercial capacity, tested not during a period of three or four days only, but during the substantial period of four months in each of two years when cars are abundant and can be supplied in sufficient numbers to meet all the requirements of the mines, it was thought by the defendant that a more equitable distribution would result. Manifestly a mine having a small physical capacity, but which has secured large contracts, would prefer a system based on commercial capacity only. On the other hand an operator of a mine having a large physical capacity, but which has no large contracts, would prefer a system based upon physical capacity only. In

combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared on this record to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only.

But it is insisted by the complainant that the mine receiving foreign railway fuel cars and private cars during the free car periods is thereby able to increase its percentage rating as compared with the operator who receives no foreign fuel or private cars. It is urged that the operator who happens to have contracts for delivering coal during the free car periods, or whose sales are increased during those periods because of personal connections with coal dealers and consumers, is given an undue advantage, when, in addition to the physical capacity, the actual shipments for the two preceding years are added for the purpose of arriving at his percentage basis; and that the method of rating mines by taking into consideration the previous shipments not only results in increasing the percentage of certain operators but ultimately results in increasing the actual physical capacities of such mines. It may be that this is true. But is the defendant's system of car distribution on that account
1256 necessarily unlawful? It is not unlawful for coal operators to have contracts to supply connecting railway lines and private industries; and it does not follow because a large operator has large contracts that he is getting an undue or unlawful advantage under this system of car distribution over smaller operators in the same district. While the operator with large contracts may be able to keep his mine running more constantly and at a lower cost per ton, and may develop it more rapidly and thus in the progress of time be able to enlarge its percentage in the car distribution, nevertheless if that opportunity be open under the defendant's rules and regulations to all operators we do not clearly see on what ground the system must be condemned. Certainly the record does not advise us of any specific instances of discriminatory results to the smaller operators arising out of the defendant's system. The attack upon it is based largely upon the mere opinions of a few operators who testified that the system was unfair to operators having no contracts. As the record now stands the commission is asked to hold, as a matter of law rather than as a fact demonstrated by actual experience, that the defendant's method of rating mines is unduly discriminatory, and that the only proper and lawful basis for the distribution of coal cars among the mines of a coal district is their respective and relative physical capacities.

Neither this record nor the records in other proceedings and investigations relating to coal-car distribution justify us in holding as a fixed rule of law that the physical capacity of the several coal mines

in a given district is the only lawful factor upon which a system o car distribution may be built up, and that their actual requirement or commercial capacity may not lawfully be considered in the dis tribution. As at present advised the commission is not in possessio of sufficient information upon which to base such an announcemen for general application. It seems to be rationally and logically question of fact to be determined according to the circumstance and conditions existing in each particular case. When examine from that point of view no such showing is to be found in this record as will enable us properly to enter an order sustaining the complaint in that respect. The present system of rating mines has been in effect on the lines of the defendant for some years. Apparently it is satisfactory to the great body of the coal operators served by the defendant; out of the 340 mines on its lines operated by about 200 different companies, only three or four operators are shown by the record to be of the opinion that the percentage basis works unfairly and disadvantageously. Upon such a showing we are unwilling to disturb the situation and see no just grounds for doing so. But we base this view on the record only and are not to be understood as closing 1257 the question to further consideration. All we desire to be understood as saying at this time is that a method of mine rating that is apparently satisfactory to the great body of coal operators on a carrier's line ought not to be disturbed except upon a stronger showing than is here made.

Finally complaint is made of what is called "pooled percentages." The defendant permits the car percentages of several mines controlled or operated by one company to be grouped or pooled upon one or more of the mines; that is to say, if a company owning and operating four openings is entitled in the daily distribution to 25 cars for each mine it may group or pool all these cars or any portion of them at one mine instead of using them at each mine in accordance with their respective percentages. This practice is complained of as an unjust discrimination on the ground that it permits a mining company rapidly to develop one mine after another and thereby to increase the percentage ratings of the several mines; and also that it enables a mining company to operate one or more of its several mines to a larger daily capacity and thereby reduces the cost per ton of the coal produced. Here also the record is lacking in sufficient facts and leaves us to a consideration of this complaint as a hypothetical one and as a question of law. Without committing ourselves at this time to any final opinion on the question, it will suffice to say that no sufficient showing has been made to enable us to say that this practice is unlawful and results in fact in undue and unlawful discriminations.

An order will be entered to give effect to these views.

1258

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of June, A. D. 1908

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1322. Rail & River Coal Company v. Baltimore & Ohio Railroad Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, that said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to
1259 maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars, enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant.

1260 **Interstate Commerce Commission, Washington**

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered March 7, 1910, in Case No. 1063, Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 29th day of May, A. D. 1925.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1261 Before the Interstate Commerce Commission. No. 1063. Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company

Submitted January 25, 1909. Decided March 7, 1910.

Report and order of the commission

1262 1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore Held, That the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.

4. The defendant's contention that, so long as the petitioner receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.

5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and Harry White for complainant.

Francis I. Gowen, George V. Massey, and Murray & O'Laughlin for Pennsylvania Railroad Company.

1923 REPORT OF THE COMMISSION

HARLAN, Commissioner:

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the commission may best be expressed, the petitioners bring to our attention the method or rules in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because, when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the commission to control and enter orders in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep. 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the
1264 private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the commission in Traer v. C. & A. R. R. Co. 13 I. C. C. Rep. 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioned against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceedings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was prosecuted by the commission and the whole question was considered by that tribunal in Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, and Interstate Commerce Commission v. C. & A. R. R. Co., 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the commission had previously held in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. Rep. 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the amended act to regulate commerce, and as such was a matter within the regulative power of the commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, 1265 are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distinction that must necessarily be observed by the courts between the power to regulate and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other Federal court, the right to usurp the purely administrative functions of the commision by substituting a regulation that the court might deem wise for one which it considered the commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the commission with respect to the distribution of coal cars by interstate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution. It may be well, however, first to say a word in respect to the method or basis in effect on the lines of the defendant for assigning to each of the coal mines that it serves a daily output rating for determining its proportion in the distribution of coal cars, that being one of the practices of the defendant of which complaint is made by the petitioner herein, as well as by the petitioners in the other cases in this group.

In Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. Rep. 86, it appeared that the method of rating mines adopted by that carrier involves two principal factors, (a) the physical capacity of the mine, and (b) its commercial capacity. The physical capacity is ascertained in the manner explained in our report of that case (id., p. 93)

and the method need not therefore again be described. It will suffice to say that it is substantially the plan now generally followed by coal-carrying roads. The commercial capacity, or the requirement of a mine for cars as tested by its actual shipments, is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1
1266 to August 1, in each of the two preceding years. The three figures, expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and the sum is divided by three. The result is the capacity basis that is established by the Baltimore & Ohio for determining the percentage of the available coal equipment that the particular mine is entitled to receive during any period of car shortage. After a careful consideration of the system as applied to interstate shipments, we were inclined to think and so intimated (id., p. 96) that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only.

But in this petition the complainant, as we understand its attitude, demands that the commercial capacity of the mines served by the defendant shall be eliminated as a factor in fixing their rating and that their physical capacity shall be accepted as the sole factor for determining their respective proportions in the distribution of coal cars. The defendant, while combining the physical with the commercial capacity, does so in a way that differs somewhat from the plan in effect on the Baltimore & Ohio. To the physical capacity of a mine it adds its commercial capacity for one year only and divides the sum by two. The commercial capacity, however, is not based upon shipments made from a mine during a substantial period of free-car supply, as is the case on the Baltimore & Ohio, but upon the entire volume of shipments made from the mine throughout the preceding twelve months. The ratings are revised quarterly on February 1, May 1, August 1, and November 1; the rating of any particular operation will also be revised by the defendant upon request regardless of the quarterly tests. In other words, the commercial capacity of each mine is brought up to date at each quarterly rating period by taking into consideration its new tonnage for three months and adding to it the tonnage of the preceding nine months previously used in the preceding rating. In this manner the defendant endeavors to follow up as closely as possible the fluctuations in the market, labor conditions, and car supply. By combining the commercial capacity of a mine, thus ascertained and constantly brought up to date, with its physical capacity, the rating of the mine in the distribution of coal-car equipment is determined. And if the system of rating is equitably applied to all mines served by the defendant we are unable, so far as our investigations to the present time have informed us on the question, clearly to see upon what

grounds it may be said to result in an unequal, unfair, or discriminatory distribution of its equipment.

1267 But, as heretofore stated, the complainant insists that the physical capacity of a mine is the sole and only proper basis for determining its rating for purposes of car distribution. The economic waste involved in a system that leads operators to develop their mines beyond their commercial requirements and for the sole purpose of increasing their percentage of coal-car supply was discussed in Rail & River Coal Co. v. B. & O. R. R. Co., supra. While an order of the commission in a particular case must necessarily fix the rights of the parties to the proceeding, so far as past shipments are concerned, and must necessarily restrain, until our further order, the continuance of the rate or practice that we condemn, and compel the carrier to observe the rate or practice that we prescribe for the future, these great questions of transportation are not foreclosed of further discussion and consideration upon further complaint. Additional experience with the actual operation of rules that combine commercial with physical capacity in the rating of coal mines for car distribution, may throw new light upon a matter that has vexed the commission as well as many carriers that have endeavored to do equity as between different mines on their lines; and if so, we shall not hesitate to modify what has been said here and in other cases before us on that question. The principle of stare decisis has little application in proceedings before us involving questions of this nature. But at this time and upon the present state of our information and experience in the matter we can not accept the complainant's contention that physical capacity alone is the fair and sound basis for rating mines for car distribution. Speaking in precise terms, it is of no real concern to a carrier how large a particular mine may be and what are its possibilities in the way of daily output, except as those factors may afford some measure of what its actual shipments will be. The utmost obligation that the law lays upon the carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the owner of a mine as expressed in its physical development, but to meet his actual shipments. A mine rating that is adjusted to the expectations of the operator and altogether ignores his actual requirements might easily result, in a period of car shortage, in giving him cars for every ton of coal that he can actually dispose of, while an adjoining mine, with a small development but a larger demand for its output, would get but a fraction of the equipment that it needs to meet its actual contracts.

In Powhatan Coal & Coke Co. v. N. & W. Ry. Co., 13 I. C. C. Rep. 69, the record showed that thousands of dollars had been expended in the erection of additional ovens, not for actual use or to meet any commercial demand for more coke, but solely for the purpose of securing additional cars in the distribution by the

1268 carrier of its equipment during car shortage periods; and we there condemned a rule for the distribution of coke cars that

ignored actual shipments and was based solely on the number of coke ovens that had been erected by the different coke companies. Nothing has since developed, or was suggested in this proceeding, to change our view on the general question, and the complainant's contention that physical capacity is the fair and reasonable basis for rating mines for car distribution must therefore be dismissed as untenable.

We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1905, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in Logan Coal Co. v. P. R. R. Co., 154 Fed. Rep. 497, 498, where the court says:

"To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual

cars will be able to ship on the day instanced 410 tons, as
1269 against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times."

The results arrived at by the court in its illustration seem to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons, as stated by the court. The court used a car capacity of 70 per cent as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent, which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each a day and available equipment with a total capacity of 70 per cent, or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this commission has approved in Railroad Commission of Ohio v. Hocking Valley Ry. Co. and Tracy v. C. & A. R. R. Co., supra, would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating of the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equip-
1270 ment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent more coal than its competitor, while under the rule approved by the commission the

shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in Logal Coal Co. v. P. R. R. Co., supra, said, p. 503:

The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: United States ex rel. Coffman v. N. & W. Ry. Co. (C. C.), 109 Fed. Rep. 831; United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al. (C. C.), 125 Fed. 252; W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co., 134 Fed. 198, 67 C. C. A. 220; United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co., 143 Fed. 266, 74 C. C. A. 404; State ex rel. v. C., N. O. & T. P. Ry. Co., 47 Ohio St. 130, 23 N. E. 928; United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al., 154 Fed. 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (supra) the position of the commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president
1271 of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

In view of our finding herein that the practice of the defendant in not counting assigned cars against the ratings of the mines
1272 has been discriminatory and has resulted in injury to the complainants in this group of cases, it is suggested that it will not be fair or equitable to content ourselves with the condemnation of that practice and the entry of an order requiring a different practice for the future; such a course, it is said, will leave the complainants under the disadvantage that the practice has wrought in the past, while giving to the favored mine the results that have wrongfully accrued to them. In other words, it is said that, under the rules here condemned, the preferred mines have been able year by year to en-

large their commercial output while the commercial output of the complainants and others has been restricted; and that justice requires that there shall be a new point of departure, at least for the present, based solely upon the respective physical capacities of the mines on the lines of the defendant. Exact justice is ordinarily not attainable. It is difficult no less for this commission than for a court to deal with such a situation as this with mathematical accuracy. The most that either may hope to accomplish in such a state of facts is to do substantial justice; and this we do, so far as it seems to us possible, when we require the defendant to adjust its rules on a proper basis for the future, and give to the complainants the opportunity to have their injuries redressed in the form of damages. While the tendency of the prior rules must have been to enlarge the commercial capacity of the preferred mines, we can not doubt that their physical capacity has also been enlarged. And we have no assurance that an order requiring the defendant, for the present, as suggested, to distribute its cars on the basis solely of physical capacity would not, in some cases at least, work very substantial injustice.

That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations. But just how far this condition of affairs, prior to January 1, 1906, when the new regulations went into effect, may adversely have affected the complainant in a financial sense it is impossible upon this record to say. The increasing price received for coal in the general markets suggests the possibility that the coal not mined at that time may subsequently have been mined and sold to the complainant's advantage. There are one or two other matters, however, of which complaint is made and to which it may be well here to refer.

1273 The evidence shows that quite frequently, just how often not appearing, cars were placed at the mines of the petitioner too late to be loaded on that day, and one of the complaints made in the petition is that prior to January 1, 1906, the defendant charged such cars against the complainant's allotment not only for the day on which they were so placed but also against its allotment for the following day. It is even said that the complainant's mines were charged with cars placed there during the night. At the time in question, whatever may now be the case, it was the custom of the miners to enter the mines at 8 a. m., and under the rules then in effect, if cars were not on the siding ready for loading at that time but were received later during the day they would not be loaded until the next day. It does not appear just what the defendant's system was prior to January 1, 1906, with respect to the counting of cars placed at the mines for loading and not loaded until the following

day. But the distribution sheets after that date contained a rule as follows:

"A car placed too late for loading will not be counted as available for loading until the following day. A car available for loading and not loaded will be counted each day in column headed 'Empty cars over' until loaded or otherwise disposed of. A car loaded and not consigned will, unless consigned on the unloading day, be counted each day in column headed 'Unconsigned loads over' until consigned."

No claim is made upon the record that this rule, which seems still to be in effect, does not give fair results or that there is any discriminatory practice being carried on with respect to this phase of car distribution. So far as concerns the defendant's practice before that date there seems to be no indication of any discrimination in this respect against the complainant in this or in the cases that follow it; nor is there any evidence that other mines were unduly favored in that regard.

It also appears that at an expense of about $5,000 the complainant had constructed a tipple at its mine No. 2 and also a siding connecting it with what is known as the "Fuller Run tracks," a road about one mile long extending from the defendant's line to mines from which shipments had been made for a number of years, but which at this time seem to have been closed. From its mine No. 2 the complainant was ready to make shipments in April, 1903, but the siding, as it asserts, was spiked down by the defendant and kept in that condition for about nineteen months. Requests were made by the complainant from June 28 to July 31, 1903, for cars enough to ship 100 tons of coal per day from that mine. But no cars were furnished by the defendant until January 17, 1905, and then only after mandamus proceedings had been instituted in the courts. The defendant's failure to supply cars for that mine, while supplying cars to other mines in the district, is one of the discriminations alleged in the com-
1274 plaint. What reason it had for refusing or failing to set cars there is not satisfactorily explained of record. But for some reason also not explained the complainant allowed the matter to rest in that condition for many months without taking any steps against the defendant and without even renewing its demand for cars so far as the record discloses. It is not clear, moreover, that the alleged closing of that siding by the defendant can fairly be regarded as a basis for a charge of discrimination; it has more the character of a tort or a wrongful violation of the defendant's general duty to the complainant as a common carrier for which an appropriate action in the courts would doubtless lie to recover any damages thus sustained.

It is also asserted by the complainant that its mines were unfairly rated when compared with the ratings assigned to other mines in the same district and that as a result of this discrimination it suffered substantial losses. Although it appears that the capacity assigned in 1903 to certain of the mines of Williams & Company in the same mining district was greater than that established for the same mines

in 1906 after a more accurate system of mine rating had been devised, the proof is not sufficiently clear to permit of a definite finding of a discrimination against the complainant in that respect. It does appear that prior to January 1, 1906, the rating assigned to mines in the nine coal-mining districts on the lines of the Pennsylvania were made, with the approval of the general superintendent, by division superintendents upon the general information of the latter officials, derived from observation and their general knowledge, and not upon any definite principle or plan for rating mines. The ratings, therefore, varied in accordance with the information and ideas of the different superintendents. We do not in fact understand the defendant to claim that there was any real system of mine rating in effect at that time. This lack of system was indeed characteristic of other large coal-carrying lines at that time, as is shown in the report of this commission to the Senate and House of Representatives in the investigation to which reference has just been made.

The defendant meets this point by asserting that the real question to be determined is whether the complainant received less than its proper share of the cars distributed by the carrier during periods of scarcity of equipment and that it is not material that some other coal operator may have received more than his quota of available cars. In other words, the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The act to regulate commerce as amended 1275 not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fare ratably better than he does at the hands of the carrier. It may be true that a court would not allow the complainant damages for losses due to the defendant's failure to furnish it cars that it was not entitled to receive, but this commission may surely require an interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive.

But upon this part of the case the complainant's own witnesses do not sustain it to the full extent of its contentions, and we can only express the general impression that neither in its rating nor in its car supply did the complainant fare as well at the hands of the defendant as it possibly should have done. We find it impossible, however, to arrive at any clear or accurate statement of the extent of the discrimination. Williams & Company, its chief competitor in that district, received many more cars than the complainant and their mines enjoyed a higher capacity rating than was assigned to the mines of the complainant. They sold large quantities of coal to the defendant for use in its locomotives, and these cars were not counted against Williams & Company. While there was doubtless some discrimination in these matters, as there certainly was in the

defendant's failure to count its own fuel cars against those mines, it is difficult, if not impossible, to assign definite boundaries to it and to say at this time what should have been the rating of the respective mines and what should have been the proportion of each in the distribution of the defendant's coal-car equipment.

It is suggested that under its corporate charter, granted by the State of Pennsylvania, the defendant is not only a common carrier or transporting agency, but that its rails are at the same time a public highway, and it must therefore haul loaded or empty private cars for their owners upon reasonable terms. There is in its charter some language to that effect; and in Boyle v. P. & R. Ry. Co., 54 Pa. St. Rep. 310, cited by counsel for the defendant on the agrument, the Supreme Court of Pennsylvania held that a similar charter of another company in that state contemplated such a dual use of the road, by the company itself as a carrier in transporting the freight of shippers and by the owners of cars as a public highway substantially in the sense that a canal or turnpike is a public highway. Counsel, therefore, contends that the dual capacity in which the defendant is required to serve the public, as shippers and as car owners, necessarily eliminates from the case the argument that individual cars or private coal cars must be treated as railroad-system cars for purposes of allotment or distribution. It is urged that private cars may properly be counted against the mine owning them only in the manner and
1276 to the extent that the defendant's present rules take them into account in periods of car shortage.

Without entering upon any discussion of the extent to which the terms of a charter granted to a carrier by a State may control or limit the performance of its functions and obligations as an agency of interstate transportation, it will suffice to say that in none of its decisions relating to coal-car distribution has the commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the commission has not only recognized the right of carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators. As the commission has made no ruling that conflicts with the rights and obligations arising under the defendant's charter as construed by the State supreme court, we need not, and do not, here consider what the situation would be if the terms of its State charter required the defendant carrier in the distribution of its coal-car equipment to work an undue discrimination against an interstate shipper in violation of the act to regulate commerce as amended.

The petitioner in this complaint bases its claim for damages on the amount of coal that it might have mined, if the defendant had furnished it with a sufficient supply of cars to enable it to work its mines

twenty days a month during the period covered by the complaint. It also claims that the cost of mining the coal actually taken out during the period in question was higher than it would have been had the defendant furnished it with an adequate supply of cars, thus enabling it to operate its mines to the best advantage by running them regularly and to their full capacity. In making up the amount of its claim the petitioner excepts a period of four months during 1906 when its miners were on a strike and takes the average selling price of coal during the remainder of the period covered by the action. It deducts as the cost of mining an amount per ton that is estimated as the probable cost had the defendant furnished the complainant with cars enough to enable it to run its mines at full blast and with the regularity that produces the best results. Upon this general basis the complainant asserts that it has been damaged as the result of the alleged discriminations against it by the defendant in the sum of $127,855.65, and for this amount it asks an award at the hands of the commission.

1277 The complaint herein was filed before our decision in Joynes v. P. R. R. Co., 17 I. C. C. Rep. 361, was announced. In that proceeding damages were demanded for losses alleged to have been suffered in the decay of the complainant's fruit by reason of an alleged discrimination against him in favor of other dealers in fruit to whom the defendant, as the complainant contended, had given a preferred use of its unloading platform, thus delaying his shipments until the fruit was spoiled. We held, upon grounds that are there fully stated and need not be repeated here, that while the commission was competent to find that a discrimination had been practiced, the measurement or ascertainment of the damages the complainant had suffered in consequence thereof was a judicial question for the courts and not for the commission; the view expressed was that the only damages that may be assessed by the commission under the amended act were rate damages or damages that could be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought lawfully to have been charged; and that the complainant's remedy for the damages in compensation of the loss suffered in the value of his fruit was in the courts.

That case differs from this in that it involved a single wrong in the nature of a tort against a particular shipper, while this case in its larger aspect involves the validity of a rule for car distribution applicable alike to all coal shippers on the line of the defendant and resulting, as we have pointed out, to the benefit of some shippers and to the injury of others. We have found that in the particulars herein explained, discrimination was practiced, and have held that for such damages as resulted the complainant is entitled to recover from the defendant. As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices, and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the commission is divided as in the case to which we have just alluded. The majority

is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts. At the most any finding by the commission as to the amount of damages would be the expression of an opinion that could not be enforced by the commission and would have no conclusive and binding effect upon the court to which, in any event, resort must be had by the complainant for a finding and judgment in the usual manner required by fundamental law. The minority, conceding some of the difficulties to be encountered in dealing with such matters, nevertheless interpret the law as necessarily casting that burden upon the commission.

Since our decision in Joynes v. P. R. R., supra, was announced, our attention has been called to an opinion by Judge McPher-
1278 son of the United States District Court, sitting in the Circuit Court of the United States for the Eastern District of Pennsylvania, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed. Rep. 748 (advance sheets of May 12, 1910). That was an action by the coal company against the defendant herein to recover damages in the sum of $250,000 for the sales and contracts that are alleged to have been lost because of the discrimination resulting from the same coal-car distribution rules that are involved in the proceeding now before us. Citing Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Baltimore & Ohio R. R. Co. v. U. S., 30 Sup. Ct. 164; and Interstate Commerce Commission v. I. C. R. R. Co., 173 Fed. Rep. 930, Judge McPherson holds that the commission and not the courts has primary jurisdiction to award reparation for the general damages of that character that may have resulted from a preferential practice in the distribution of coal cars during a percentage period. The case brings a new element into the situation. That is the court whose jurisdiction this complainant would doubtless invoke in order to secure pecuniary redress for the wrongs which the complainant claims to have suffered as the result of the discrimination we here find to have been practiced against it and others by the defendant. There is possibly no necessary conflict between the view there expressed and a refusal by the commission to measure the complainant's damages in this case, after having found that a discrimination existed; but there is some danger, in view of the ruling of the court in that case, that justice may be defeated altogether in this case if we proceed no further with it. We have concluded therefore to order a further argument early in the fall with respect to the amount of damages suffered by the complainant in this proceeding, and by the petitioners in the other cases in this group of complaints, as the result of the discriminations that we find to have existed. Under all the circumstances, this seems the prudent course to pursue. The order of the trial court dismissing the action of the Morrisdale Coal Company, for want of jurisdiction, has been taken for review to

the Circuit Court of Appeals; and if our further consideration of this group of cases results in awards of damages to the complainants and they resort to the courts for their enforcement, in case payment is contested by the defendants, the courts will then have the whole question before them and some definitive interpretation of the act with respect to the extent of the authority of the commission and the courts in this regard will follow, and this is highly desirable for the future guidance of both.

An order will be entered in accordance with these conclusions.

1279 PROUTY, Commissioner, dissenting:

Although I am myself of the opinion that this case has been sufficiently talked about and sufficiently considered, and that it ought to be finally disposed of, still if the majority deems it necessary to hear further argument upon the question of damages, I do not dissent from that course. I do not agree with the holding of the majority that this commission has no authority to assess and award these damages, and while it is not now proposed to make any order from which I dissent, I wish to express my views upon that subject.

To my mind there is a clear distinction between the Joynes case, 17 I. C. C. Rep. 361, and the one before us.

Joynes was a fruit merchant located at Pittsburg, whose complaint was that the defendant had systematically delayed the movement and delivery of his traffic, in comparison with that of his competitors, whereby he had suffered serious damage. The act of the defendant was alleged to be in violation of the third section and the holding of the commission was that, even if in violation of that section, damages could not be awarded by the commission. No rate, regulation, or practice of the defendant was involved. The act complained of was personal to Joynes. While it seems to me that under the terms of the eighth and ninth sections of the act Joynes, in a case like that detailed, had a cause of action for the recovery of damages against the defendant which he might prosecute before this commission, it also appears to me that he might have brought his complaint in the first instance before the court. Had he begun such a suit it would not have been obnoxious to the objections sustained by the court in the Abilene case, 204 U. S. 426, or the Pitcairn case, 215 U. S. 481.

In the case before us this is different. Here is not a particular discrimination arising out of the conduct of the defendant toward a particular shipper, but rather a discrimination which inheres in a rule of the defendant applicable to all shippers and presumably enforced alike as to all shippers. While the courts might well be invested with exclusive jurisdiction to hear and determine suits like that of Joynes, it seems to me that in the case before us the commission not only must, under the statute, but should, as a matter of convenience, award damages.

Sections 8 and 9 in my opinion give to the complainant a right of action for damages against the defendant and confer upon it the privilege of applying to this commission for an order awarding these damages. It is impossible for me to put any other meaning upon

the plain language of these sections, which read, so far as material to this question, as follows:

"SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any
1280 act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Here is a clear statement that in case of a violation of the act resulting in damages to any person the carrier shall be liable for such damages, and an equally explicit declaration that the recovery of such damages may be had either by a proceeding before the commission or by suit in court; but that both remedies shall not be pursued for the recovery of the same damages.

The reasons of the majority for declining to exercise this jurisdiction, which is explicitly conferred by the ninth section, are stated in the Joynes case. It is there said in substance that damages resulting from a violation of the act may be divided into two classes, "rate" damages and "general" damages. By rate damages are meant those damages which can be ascertained by computation from a reference to the rates of the carriers only. The commission determines what the reasonable rate ought to be; it determines what rate has been paid; the damages are the difference between the rate exacted and the rate which should have been exacted. These damages the commission can and should award.

General damages may involve a consideration of all those elements which enter into the determination of damages in other cases. There is no exact measure by which such damages can be computed. To assess them involves the consideration of evidence and the exercise of judgment. For the assessment of such damages this commission has no greater qualification than a jury. Therefore, it is assumed that Congress, notwithstanding its express language to the contrary, did not intend to confer upon the commission authority to deal with damages of that character.

In support of this somewhat novel canon for the interpretation of statutes the commission refers to the action of the Supreme Court of the United States in the Abilene case, supra, in which that court held that, notwithstanding the language of the ninth section, by which a claimant is given an election between his suit in court and his proceeding before the commission, nevertheless, in certain cases,
1281 the proceeding must be in the first instance before the commission and can not be in court. Just as the Supreme Court in that case has read out of the ninth section the right to begin certain cases before the courts, so the commission now proposes to read out of that same section the right to proceed in certain cases before the commission.

I can find no case in which the Supreme Court of the United States has ever undertaken to qualify the express language of an enactment upon the ground adopted by this commission in the Joynes case. That court has repeatedly said that courts have nothing to do with questions of expediency. Whether a statute is wise or unwise, whether it is expedient or inexpedient, whether the object aimed at is reached in the best way or not, are questions for the legislature, not reviewable by the courts. The Abilene case, as I read it, not only fails to sustain the position of this commission in declining to accept jurisdiction in matters like that before us, but, upon the contrary, plainly holds, both by necessary inference and by express language, that in a case like the one now under consideration the only tribunal in which complaint can be brought and damages obtained is this commission. If that be so, it is certainly the duty of the commission, no matter how inconvenient the exercise of that function may be, to entertain the complaint, determine as best it can the damages, and award those damages by its order.

It should be clearly understood at the outset just what that violation of the act is of which complaint is made and for which damages are demanded.

It is true upon most coal-carrying roads, and was true upon the lines of the defendant during the period covered by this complaint, that in times of an active coal movement there are not sufficient cars to supply the demands of all mines. The amount of business which the miner can do depends upon the number of cars which he can obtain for the movement of his product. To furnish one mine with cars while they are denied to a competing mine means that the favored mine shall do business while the other stands idle. This renders preference in the furnishing of coal cars, a most serious form of discrimination, and make necessary the establishment of definite and uniform rules and regulations for the distribution of such cars to different operations during the period of car shortage.

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly

entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination.
1282 It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under the scheme in force; but it applied a system or a practice which in its working out was unjust and discriminatory to the complainant.

The commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

To my mind there is no distinction between a practice of this kind and a rate. Every reason which requires the commission to entertain claims of unreasonable rates and to award damages if the claim is sustained, requires with equal force that claims on account of discrimination by the application of general rules and practices of this character should be made in the first instance to the commission and that damages should be awarded if the practice is found unlawful. If any distinction can be drawn between instances in which the commission may and may not award damages for a violation of the act, that distinction should be founded, not upon the character of the damage, but upon the character of the act out of which the damage grows. If the thing alleged to be unlawful is a rate, regulation, or practice of general application which touches the entire shipping public alike, over which the commission has control, with respect to which it must determine the reasonableness, and as to which it could order the substitution for the future of a different rate, regulation, or practice, then the proceeding for damages must be begun in the first instance before the commission, and it is the duty of the commission to ascertain and award the damages. This position is fully sustained by the recent decisions of the Supreme Court.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, is familiar to all and only the briefest reference to it is needful.

The Cotton Oil Company claimed that certain rates imposed by the defendant for the transportation of cottonseed were excessive and brought suit in court to recover the amount of the excess. The transportation was interstate and the rates charged were those established under the provisions of the act to regulate commerce. The railroad defended upon the ground that a rate so established was conclusive upon all the world until changed by the Interstate Commerce Commission; that no suit could be brought either at common law or under the ninth section, but that the complainant must begin his proceeding by filing claim before the commission.
1283 This contention was sustained by the Supreme Court in a convincing opinion. Said the court: "The fundamental pur-

pose of the act is to prevent preference and discrimination. For this purpose it is required that rates shall be established and notice given to the public in a certain specified manner and that the rate so established shall be collected of all shippers alike. If, now, suit can be brought for a recovery of a portion of this rate in the first instance, either in court or before the commission, at the election of the shipper, it may follow that one jury will determine one rate to be reasonable, another jury a second rate to be reasonable, while the commission may be of the opinion that still a third rate should be charged. This will of necessity produce the very discrimination which the act was intended to prevent. To give such a construction to the language of the ninth section would be to destroy the act itself."

It was held therefore in that case that the only remedy of a shipper for the payment of an excessive rate was to apply to the commission, which, if it held the rate to be excessive, should order the establishment of a reasonable rate for the future and award damages to the complainant upon the basis of the rate so established.

Let it be carefully observed that this conclusion was not reached because the commission was an expert body, more competent to determine the reasonableness of a rate than a jury; nor because the rate was filed in its office and under its direction, and could, therefore, be more conveniently ascertained and applied; nor for any consideration of expediency or convenience, but because the opposite holding would accomplish the very thing which the act to regulate commerce was intended to prevent.

This further situation might arise: If a rate has been pronounced unreasonable by the commission and reduced, or if a rate has been voluntarily reduced by the carrier without any action of the commission, may a shipper, with respect to a time anterior to the action of the commission or to the reduction of the rate, maintain a suit in court for the payment of the excessive rate?

Apparently, the same reasoning which leads to the conclusion that application must be first made to the commission in case of an existing rate would lead to the same conclusion with reference to a rate no longer in effect, for if such suits could be brought in court it might follow that one shipper would in fact pay one rate and another shipper another rate. Such is the conclusion of the court, which, on page 142, says:

"* * * Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation
1284 to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

And again, on page 446, the following language is used:

"* * * And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands."

It appears, therefore, that whether the rate to be attacked is still in force or has been superseded by a lower or different rate, the complaint must be addressed in the first instance to the commission, which is required to determine a reasonable rate and to award damages or reparation upon that basis. Whether, after the commission has determined that a certain rate should have been charged during a given period, a shipper having paid the higher rate can begin suit in court in the first instance for the recovery of the excess, I express no opinion. It is evident that the discrimination complained of would not arise provided the rate fixed by the commission could in any way be made conclusive in the suit instituted in court. However that may be, it is clearly the right of the shipper under all circumstances to file his claim with the commission in pursuance of the provisions of the ninth section, and it is clearly the duty of the commission, in the opinion of the Supreme Court, to entertain the claim, prosecute the inquiry, and award the reparation.

I am unable to see any valid distinction between an excessive rate and a rule or practice for the distribution of coal cars like that involved in this proceeding. In each case the rate or regulation is of universal application. In either case to apply one rule to one shipper and another rule to another shipper must result in preference. In each case the commission has power to inquire whether the existing rate or regulation is lawful and to prescribe another in substitution for the future. No reason is urged by the court in the Abilene case in justification of its holding there which would not apply with equal force in support of a similar holding here. That this must be so is no longer debatable since the decision of the Supreme Court of the United States in Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, by which it was affirmed that the authority of this commission over a regulation for the distribution of coal cars is exactly the same as its authority over the rate of transportation itself.

The Illinois Central Railroad is a large carrier of coal and establishes, in common with other coal-carrying railroads, rules for the distribution of coal cars, in times of car shortage, between the
1285 different mines served by it. Complaint was made to the commission that the method of distribution in force upon the Illinois Central resulted in unjust discrimination against the com-

plainant. There was no question as to the manner in which the capacity of the mines was ascertained and the percentage to which each mine was entitled determined, but it was asserted that certain classes of cars were not counted against the assignments of the mines to which they were delivered. In allotting cars the Illinois Central, according to its regulations, did not count private cars which were owned by the mine, foreign railway fuel cars which had been delivered to the Illinois Central by some other railroad for the purpose of being taken to a particular mine, and the fuel cars of that company itself which were used in transporting coal from the mine to the place where it was to be used by the railroad. The complainant contended that all these classes of cars should be counted against the assignment of the mine.

The commission held with the complainant and made an order directing the Illinois Central to count all such cars in the future. That company conceiving this order to be unlawful petitioned to the Circuit Court for the Northern District of Illinois for an injunction against its execution. Upon hearing that court was of the opinion that the order of the commission was correct as to private cars and foreign railway fuel cars, but incorrect as to company fuel cars, and an injunction was accordingly issued restraining the operation of the order as to such company fuel cars.

From this the commission appealed to the Supreme Court of the United States, which reversed the decree of the circuit court and sustained the order of the commission in full.

The contention before the Supreme Court was that the only order which the commission could make under the fifteenth section was one prescribing a rate or a rule, regulation, or practice affecting a rate; that this regulation, while the effect of it might be to prevent discrimination, was not a regulation affecting rates and therefore not within the power of the commission to make. The court held that a regulation of this kind was within the terms of the fifteenth section; that, therefore, the commission might prescribe the rule which it did, and that such rule when prescribed would be binding upon the Illinois Central in its relations with all its coal mines.

This case determines that there is no distinction between an order of this commission fixing the rate for the future and an order establishing a rule for the distribution of coal cars; and this being so, I am utterly unable to see any ground upon which a distinction can be made between the remedy which is open to the shipper for the recovery of damages in the two instances. If he must, in case of the excessive date, apply to the commission in the first instance, so in
1286 the case of the discriminating practice he must first make application to this body. To permit the institution of a suit in court until the rule has been fixed by the commission would result in exactly the same discrimination and perference in case of the regulation touching the distribution of cars as it would in case of the excessive rate. It must follow as a necessary inference from

this decision that courts are without jurisdiction to entertain in the first instance suits for damages resulting from the enforcement of improper rules for determining the capacity of its coal mines and the distribution of its coal cars in times of shortage between the different mines served. Any possible doubt upon this point has been laid at rest by the decision of the Supreme Court in B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, decided at the same time with the Illinois Central case just referred to.

The twenty-third section of the act gives a remedy through the district and circuit courts of the United States by mandamus in instances where a carrier is granting a preference in the movement of traffic or in the furnishing of cars or other facilities. The Pitcairn Coal Company, claiming that the Baltimore & Ohio Railroad was discriminating in favor of its competitor by the rules which it had established to govern the distribution of coal cars, began proceedings for mandamus against that company. It is not necessary to detail the various specifications of preference set forth in that proceeding. The general system of car distribution in vogue on the Baltimore & Ohio was analogous to that established by the Illinois Central, and the grounds of complaint, while more numerous in this case than in that, had mainly to do with the failure to count different classes of cars.

After an elaborate hearing upon the facts the circuit court sustained the contention of the relator, the Pitcairn Coal Company, upon a single item, denying in the main the prayer for relief. Upon appeal by the Pitcairn Company, the Circuit Court of Appeals reversed the court below and held that the relator was entitled to the relief prayed for. The Supreme Court of the United States, upon appeal by the Baltimore & Ohio Company, decided that the Circuit Court had no jurisdiction under the twenty-third section, and that the suit should be dismissed. It placed its decision entirely upon the Abilene case, pointing out that there was no distinction between a rule or regulation of this character and a rate, and that therefore suit should have been begun in the first instance before the commission.

It is therefore now determined beyond controversy that the complainant in the case before us could not at the time this complaint was filed have commenced in court, either at common law or under the twenty-third section, or under the ninth section, a suit at law,
1287 for a correction of the discriminations complained of or the recovery of the damages incident upon those discriminating practices. It must have applied to this commission. How, then, can this body consistently decline to exercise the jurisdiction which is plainly cast upon it by the statute as interpreted by the court of last resort and refuse to pass upon its claim for damages?

The opinion of the majority indicates that complaint may be made to the commission, which will thereupon determine whether the regulation attacked is or has been in violation of law. If the commission condemns the regulation, the complainant must then begin an inde-

pendent suit in court for the recovery of his damages, upon the basis of the regulation approved by the commission. The theory seems to be that the commission has jurisdiction to prescribe the rule, but has no jurisdiction to award the damages which have resulted from failure to establish and observe a proper regulation in the past.

I express no opinion as to whether, if this commission has definitely determined that a given rate or a given regulation for a definite period has been discriminatory or excessive and has prescribed the rate or regulation which will be reasonable or just, a shipper may or may not begin suit in court for damages based upon the rate established by the commission. Such a rule would not be obnoxious to the objections found by the Supreme Court to the maintenance of the suits of the Abilene Cotton Oil Company and the Pitcairn Coal Company. It may be that such instances would present an opportunity for the alternative mentioned in the ninth section. I also think that a case like that of Joynes, where the act of the carrier is directed to a particular individual and does not consist of the enforcing against the public of a general rate, regulation, or practice, presents an instance where the party aggrieved may either sue in court or present his claim to the commission. But this complainant must have begun before the commission and the commission should have jurisdiction to award the damages.

Upon what theory does the conclusion of the majority to the contrary rest? What is there in the language of the act which supports it? What is there in the structure of the act which lends countenance to it? To my mind both the language and the theory of the statute are directly opposed to it.

Nothing can be plainer than that Congress intended to confer upon this body the authority and to lay upon it the duty to award damages for infractions of the act. This idea runs through the entire framework of the statute.

Section 9 provides that the person damaged may apply to the commission or may bring suit in court, but shall not adopt both remedies for the same violation.

1288 Section 13 provides that if the carrier "shall make reparation for the injury alleged to have been done, such carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of."

Section 14 provides that "in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 declares that if the commission shall determine that any party complainant is entitled to an award of damages it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." The same section fixes the period of time within which claims for damage shall be filed with the commission and within which suits shall be begun in court to enforce the orders of the commission awarding damages. That section also prescribes in detail the legal proceedings by which an award of damages may be enforced against the defendant.

Up to the time of the Joynes case it had been, as is pointed out by Commissioner Lane in his dessenting opinion in that case, 17 I. C. C. Rep. 361, the uniform practice of the commission to award reparation in all cases where damages accrued from a violation of the act.

It is said that the Interstate Commerce Commission is an expert tribunal and that the assessment of damages is not within the range of its expertness; that it is an administrative body, and that the determination of damages is judicial and not administrative; all of which amounts to saying that the commission is not qualified to deal with this question.

To this I am not prepared to assent. I can not admit that this body is not as well qualified as a traverse jury to assess the damages of these complainants. For years we have investigated, in one form and another, in all its ramifications, the business of mining and selling coal. We understand, as no jury without that knowledge possibly could, the effect of this discrimination upon the business of the coal operator. In my judgment the decision of the commission would be more intelligent and less likely to be influenced by prejudice than that of a jury. But all this is entirely beside the mark; Congress, in set terms, has made it the duty of this commission to award damages, and it is no concern of ours whether that provision of law is wise or unwise.

It is said that the commission has no time to deal with such matters, and it certainly is true that its duties are various and exacting. But this, again, goes to the expediency, and that is not for our consideration; we can not decline to attempt to discharge the duties prescribed by the statute because it is inconvenient to do so.

1289 The opinion of the majority holds that the complainant must first obtain from the commission a finding that the regulation in effect has been discriminatory and determining what regulation ought to have been maintained; armed with this finding he may then bring suit in court for the recovery of his damages. It seems to me that certain practical difficulties will be found in the application of such a rule, one of which is suggested by the present case.

The complaint asks damages from 1903 to the present time. The Hepburn Act provides that suits for the recovery of damages shall only be entertained by the commission when filed with it within two years from the time the cause of action accrues, but it further provides that within a year from the passage of that statute complaints may be filed embracing all damages which had previously accrued. This complaint was seasonably filed to recover damages for the period named.

The complainant has diligently prosecuted its complaint, and now obtains a holding from the commission that the regulation attacked is unlawful. If our order be made effective on June 1, 1910, it would follow that the complainant is then for the first time in position to maintain a suit in court.

But the order of the commission fixing this regulation as to the distribution of coal cars is not of necessity final. It may be attacked

in the courts by the railroad, and still another period of from one to three years may elapse before it is finally determined what regulation should have been in force during the period when these damages accrued.

What, now, is the rule to be applied as to the running of the statute of limitations? The usual period of limitation applicable to suits for the recovery of damages of this character is from three to six years. If the six-year period were to be applied the complainant has lost his damages for at least one year. Having seasonably begun his proceeding in the only forum in which it could be begun, and having prosecuted that proceeding with all diligence, he is, nevertheless, deprived of the right to the damages for a portion of the period.

It may be suggested that the filing of the complaint before the commission may be regarded as the beginning of the suit which is subsequently brought in court. But there is no connection whatever between the proceeding before the commission and the suit in court. All allegation as to damages for discrimination is immaterial and out of place before the commission. And what of the competitors of the complainant who have suffered the same discrimination? Must these parties all file suits before the commission to determine the regulation which ought to have been observed by the railway
1259 although the determination in one case must of necessity control in all cases?

It may be said that a complainant should begin two proceedings, one before the commission to determine the regulation or practice and another in court for the assessment of his damages, and that the suit in court should be continued until the commission has prescribed the rule. But the statute explicitly declares that while the party injured may begin either before the court or the commission he shall not begin in both places.

The seventh amendment to the Constitution of the United States provides that in suits at common law where the value in controversy exceeds $20 the right to trial by jury shall be preserved. The effect of this constitutional provision, if any, upon the question before us, is yet to be determined by the courts.

The original act to regulate commerce provided that an order for the payment of damages should be enforced by the court sitting as a court of equity. Under this state of the statute the commission held that it could not award damages, where a determination of fact was necessary, for the reason that the parties would thereby be deprived of their right to a jury trial. For the purpose of removing this objection the act was amended March 2, 1889, so as to provide that where suit was brought to enforce the commission's order for damages either party might demand a jury trial. That the commission understood that under the law as amended it could and should award damages appears from the following language, which occurs in the last case in which an award of reparation was refused upon this ground. Rawson v. Newport News & Mississippi Valley Co., 3 I. C. C. Rep., 266, 279:

"As to the reparation claimed, prior to the amendment of the sixteenth section of the act to regulate commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than $20 was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time."

In my own view a proceeding to recover damages for failure of a railroad company to publish and maintain a certain rate or regulation is not a suit at common law within the meaning of the seventh amendment. The legislature may prescribe either by itself or through a commission the rate or regulation to be observed. Neither the shipper nor the carrier has any right at common law to a particular rate, nor need the reasonableness of the rate prescribed by the legislature be submitted to a jury. The legislature might un-
[129] doubtedly enact that the published rate or regulation should be binding upon all until changed. If, now, it allows reparation with respect to the past it may do so upon condition that the amount shall be determined in a specified manner not involving a trial by jury.

The opinion of the majority makes no reference to the seventh amendment, nor do I see that the conclusion reached derives any support from that source, since that amendment must apply equally to the assessment of all kinds of damages. In awarding "rate" damages the commission must determine the existence of certain facts, as the weight of the shipment, its character, the conditions of the billing, etc.; and these findings of fact may be conclusive upon the right of the complainant to recover. If such findings must be submitted to a jury in one class of cases they must in the other.

The delays and expenses of the law are proverbial. Especially is this true where the defendant is a railroad company with unlimited resources. It is notorious that shippers forego claims which they believe to be just rather than incur the cost and annoyance of attempting to enforce them by law.

One cardinal purpose of the act to regulate commerce was to provide a speedy and inexpensive method by which the shipper could obtain relief in such cases. My own observation is that, to an extent, this expectation of the framers of the act has been realized. The complainant does ordinarily obtain his order for damages with less delay and outlay than in court, and the railroad generally pays the award.

The complainant claims to have been damaged by more than $100,000 through the discrimination which we have found to exist,

and its evidence tends strongly to support that claim. A material part of these damages never can be recovered unless awarded in this proceeding, and that through no fault of the complainant, which seasonably began and has zealously prosecuted its complaint. Days have been spent in the taking of testimony; all the facts are before us, and I strongly feel that we should proceed to assess and order the payment of these damages.

The opinion of McPherson, Judge, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed. Rep. 748, which has come to my attention since the foregoing matter was prepared, fully sustains the position taken.

There are two other points to which I wish to call attention.

This record indicates that at times the number of private cars delivered to certain mines has exceeded the quota of those mines. Even if private cars had been counted against the assignment of those mines, they would still have received more cars in proportion to their rating than the complainant.

1292 In such case it seems to me that the railroad is guilty of discrimination, although it delivers to the mine only the cars which that mine owns. If, for example, a railroad only had sufficient cars for its own fuel supply the mine owner who did not sell coal to the company and who owned no cars himself, would obtain no cars whatever, while his competitor with an outfit of individual cars would be supplied. I do not think a railroad can lawfully devote its tracks and its motive power to the service of one mine, while declining to give to its competitor a similar service.

Probably, in the absence of contract provision thereto, a railroad would have no right to divert the cars of one mine to the use of another, but it might and should decline to put private cars into service except upon condition that there shall be no discrimination of this kind.

This may not be a matter of much importance in the present case. The use of private cars is growing less, and the question will, in all probability, never be a living one. I do not, therefore, care to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service.

The rule approved by the commission for the rating of mines takes account both of physical capacity and commercial sales; and this, I think, is correct. When, however, the output has been limited by inability to obtain cars, and when that inability has been due to the discriminating practices of the defendant, it is evident that the application of this rule perpetuates at the outset the effect of the past discrimination. The complainant, owing to this discrimination, has not been able to sell as much coal, in comparison with its competitor, as it otherwise would, and therefore its rating upon this basis is not what it justly should be. For this reason it seems to me that it would be more just to begin upon the basis of physical

capacity alone and subsequently introduce the factor of commercial sale, considering no sales which had been made under the discriminating rating.

1293 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

No. 1063. Hillsdale Coal & Coke Company v. The Pennsylvania Railroad Company

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered that the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered that the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all
1294 such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered that the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

1295-1346 [Omitted in printing.]

1347 **Interstate Commerce Commission, Washington**

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered July 31, 1918, in case No. 4906, In the Matter of Private Cars, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

1348 **Interstate Commerce Commission**

No. 4906. **In the Matter** of Private Cars

1349 Submitted April 1, 1918. Decided July 31, 1918

1. An important part of inter-state commerce of the country is transported in privately owned cars. It is to the interest of the owners, carriers, and public that their operation should be continued, under such rules and regulations as will insure their efficient handling without discrimination against any shipper or particular description of traffic.

2. Under the situation as it exists, and under the facts and circumstances shown of record, shippers should be permitted to lease cars to transport shipments in interstate commerce from sources independent of carriers by railroad.

3. A charge in addition to freight rates should not be made for furnishing to shippers refrigerator, tank, or other special type of car, or for transporting their shipments therein, unless the freight rate are predicated on the transportation in another type of car, less expensive and not so difficult to operate.

4. Payments by carriers for the use of private cars should be upon the basis of the loaded and empty mileage, and the mileage should be computed on the basis of distance tables without the elimination of mielage through switching districts.

5. The allowance of three-fourths of a cent on the loaded and empty movements for the use of tank cars of all kinds by carriers should be increased to 1 cent a mile for the loaded and empty movements; the increased allowance should be paid for the use of live poultry, palace stock, and heater cars; and the increase should not apply to stock, coke, coal, rack, flat, box, or pocket cars, although they may be privately owned.

6. Carriers should publish in their tariffs a rule that privately owned or leased cars when unloaded at destination, unless otherwise ordered by the owner or lessee, must be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee.

7. Where carriers own tank cars which are furnished to shippers on request, they shall publish in their tariffs rules for the distribution thereof whereby each shipper who makes reasonable request may receive his proportionate share of available cars.

8. Reicing charges on shipments of fresh meat, packing-house products, and dairy products should be based on the cost of the ice and salt used, the labor, investment in icing plants, etc., together with a reasonable profit; carriers should perform the service of reicing and make the charges therefor; and shippers of these products should not be permitted to perform the service of reicing their own and competitors' shipments en route, either directly or through corporations controlled by them.

9. Carriers should provide in their tariffs that private cars standing on tracks of owners shall not be subjected to demurrage charges.

10. The Master Car Builders' Association rules with respect to repairs on private and other cars should not be filed in tariffs of carriers. Suggestions made at hearings as to modifications in rules and practices should be adopted by the association.

1350 John M. Faison for North Carolina shippers; H. K. Crafts and W. W. Manker for Armour & Company and controlled corporations; M. R. Beaman for Chamber of Commerce of Newbern, N.C.; G. R. Williams and J. C. Chase for Chase & Company; E. D. Dow for Florida Citrus Exchange; J. F. Thomas for Schrader & Company; Lloyd S. Tenney for Florida Growers & Shippers' League; W. S. McDowell, F. D. Warner, J. B. Stringfellow, and C. A. Colcaugh for shippers of Gainesville, Fla.; J. W. York and E. H. Dennison for shippers of Jacksonville, Fla.; Ralph Crews for American Cold Blast Transportation Company and Lackawanna Live Stock Express; A. C. Moore for Safety Car Heating & Lighting Company; Elias Mayer for General American Car Company; A. P. Regal for Seger & Sons Piano Company; and Luther M. Walter and John S. Burchmore for Morris & Company's Refrigerator Line, Cudahy & Company, Procter & Gamble Company, and various tank car owners.

Henry Bowen for Contact Process Company; H. W. Davis and T. J. Norton for Santa Refrigerator Despatch Company; Paul Garrett for Garrett & Company; H. B. Kooser, H. G. Herbel, and F. G. Wright for American Refrigerator Transit Company; Fred H. Wood and H. A. Scandrett for Pacific Fruit Express; G. W. Geary for Kitter Elliott Erection Company; Thomas Creigh and C. O. Cornwell for Cudahy Packing Company; Charles W. Bowden for Pennsylvania Salt Manufacturing Company; A. D. Peters for Peters Mill Company; and J. E. Robinson for Albert Miller & Company.

R. D. Ryndet, F. H. Frederick, and R. O'Hara for Swift & Company, Swift Refrigerator Transportation Company, Swift Live Stock Transportation Company, National Manufacturing Company, and Libby, McNeill & Libby; E. Haupt for Strobel Steel Construc-

tion Company; O. W. O'Berg for George A. Hormel & Company; C. A. Jennings for American Cotton Oil Company; G. E. Hutchinson for Central Commercial Company; Douglas Cambell and H. E. Felton for Union Tank Line Company; M. H. Treadwell for M. H. Treadwell Company; L. F. Moore for T. M. Chelsea Manufacturing Company and Sapulpa Refining Company; P. E. Turner and G. B. Albright for Shippers Refrigerator Car Company; H. H. Brigham for North American Car Company; Jesse M. Watkins for Mather Stock Car Company; and Edward G. Davies for certain fruit and vegetable shipping associations.

C. D. Chamberlin, W. E. MacEwen, and J. W. Boltz for National Petroleum Association, Peerless Transit Line, and Western Petroleum Association; Cassiday, Butler, Lamb & Foster, by C. R. Hillyer, for Live Poultry Transportation Company and At-
1351 lantic Fruit Distributing Company; W. S. Logan and J. W. Archibald for Dairy Shipper's Despatch; John C. Scales for National League of Commission Merchants of the United States; J. A. Morgan for National Cooper's Association and National Tight Stave & Heading Association; H. W. Marsh for Milwaukee Refrigerator Transit & Car Company; J. E. Considine, G. A. Kelly, and J. O. Wilson for the Texas Company; T. A. Gantt and J. W. Bingham for Crystal Car Line; E. H. Holden for Glen Pool Tank Line Company; L. F. Moore for certain Oklahoma refiners; and George H. Stevenson for General Chemical Company.

George Patterson Boyle for American Refrigerator Transit Company, Chicago, New York & Boston Despatch, and Sinclair Refining Company; Charles H. Hamill for California Despatch Line; F. A. Morgan for Humble Oil & Refining Company, Magnolia Provision Company, Houston Packing Company, and Fidelity Cotton Oil Company; Ranstead, Cavender & Kaiser for American Private Car Owners Association, American Agricultural Chemical Company, Archer Daniels Linseed Company, Contact Process Company, North American Oil & Refining Corporation, Continental Refining Company, Garrett & Company, Gateway Car Company, Oil Seed Company, Southern Creosoting Company (Limited), Lubricating Oil Company, Lutz & Schramm Company, London-Savannah Naval Stores Company, Magnolia Provision Company, Pelican Oil Refining Company, and Titusville Oil Works; F. J. Reichman for the Streets Company; J. Ralph Fascher for Wilson Car Lines; Benjamin C. McPherson for Sun Company, Bay Terminal Railway, and Delaware River Union Railway; A. B. Combs for Marshall Oil Company; Thomas B. Koeneke for Indianhoma Refining Company; B. M. Parmenter for Lawton Refining Company; and Robert L. Welch and W. E. MacEwen for Western Petroleum Refiners Association.

Walter E. McCornack for Jacob E. Decker & Sons; John D. Reynolds for Western Oil Jobbers Association; Clifford Thorne for Western Petroleum Refiners Association and Western Oil Jobbers Association; O. S. Keith for Keith Railway Equipment Company; C. B. Heinemann for National Live Stock Exchange; A. B. Baker

for Cleveland Provision Car Company; and D. T. Amend and Frank B. Miller for Keystone Coal & Coke Company.

F. W. Breimier for Federal Trade Commission; Walter Condran for Board of Railroad Commissioners and Commerce Counsel, State of Iowa; H. M. Freer for The Fleischmann Transportation Company; J. J. Dougherty for Quemahoning Coal Company; C. A. Severance, Stiles W. Burr, A. R. Urion, and C. J. Faulkner, specially for Armour Car Lines and Armour & Company;
1352 Charles Rippin for Merchants Exchange of St. Louis, Mo.; C. B. Ellis for Gulf Refining Company; and W. A. Schumacher for Fruit Dispatch Company.

R. Walton Moore for Atlantic Coast Line Railroad Company, Seaboard Air Line Railway, and Florida East Coast Railway Company; Arthur Hale, Wilson E. Symons, Bertram Walker, and Hugh B. Rowland for Special Private Car Committee of the American Railway Association; R. V. Fletcher, A. P. Humburg, and E. F. McPike for Illinois Central Railroad Company; W. F. Dickinson for Chicago, Rock Island & Pacific lines; Fred H. Wood for Southern Pacific system; H. A. Scandrett for Union Pacific system; B. E. Morgan for New York, Chicago & St. Louis Railroad Company; G. W. Creighton for Pennsylvania lines; O. W. Dynes for Chicago, Milwaukee & St. Paul Railway Company; R. W. Barrett for Lehigh Valley Railroad Company; C. B. Phelps, D. M. Goodwyn, E. L. Hill, and William Burger for Louisville & Nashville Railroad Company; E. S. Ballard, A. P. Humburg, H. A. Scandrett, L. T. Wilcox, F. H. Wood, D. P. Connell, Bertrand Walker, and F. W. Flott for railroads generally; Kenneth F. Burgess for Chicago, Burlington & Quincy Railroad Company; John F. Finerty for Great Northern Railway Company; and Robert H. Widdicombe for Chicago & North Western Railway Company.

REPORT OF THE COMMISSION

McChord, Commissioner:

A proposed report was prepared by the examiner, and served on the parties of record. Exceptions were filed by certain interested parties, and argument was had before us on such exceptions. Certain changes in the language of the report and suggested conclusions have been made. As so changed and modified the report is adopted as that of the commission.

This is a proceeding of inquiry upon the motion of the commission into the rules, regulations, and practices governing the operation of private cars on the railroads of the country. The proceeding was instituted in 1912, and the first hearing was had in November, 1913. Controversy with respect to the jurisdiction of the commission over private car lines took the matter to Court. Ellis v. U. S. 237 U. S. 424. Later the power of the commission to require carriers to supply equipment to shippers was challenged, and that matter became the subject of court proceedings. United States v. Pennsylvania R. R. Co., 242 U. S. 208. The court cases caused delay in the disposition of this proceeding. When the matter was again taken up for consideration, it was deemed best to reopen the case, give inter-

ested parties opportunity to submit new evidence, if desired,
1353 and advise the commission as to changed circumstances and conditions, if any, since the case was originally submitted. Hearing was had, and the matter is now submitted for final disposition.

Scope of the investigation

The original order in the case provided that the investigation should be prosecuted to determine whether the minimum weights applicable to private cars, allowances paid by carriers for the use of them, and practices, rules, and regulations governing icing and handling such cars by rail carriers subject to the act, are unreasonable, unduly discriminatory, or otherwise in violation of law. Supplemental orders were issued, instituting special inquiry into the rules, regulations, etc., governing the handling of cars for shipments of fish, fruits, and vegetables from points on the lines of the Atlantic Coast Line Railroad in Florida, Georgia, and North Carolina, to points in eastern trunk line and central freight association territories.

In 1913, interrogatories were sent to all private car owners and users in the country. They were asked to show in detail the financial results to them from the operation of their cars; the loaded and empty mileage; the cost of the cars; the cost of repairs to them, etc. At the same time, interrogatories of a similar nature were sent to all rail carriers to determine the total number and different kinds of cars owned by them; the empty and loaded mileage; the amounts paid to private car owners; cost of repairs etc. The returns show operations for the year 1912. When the proceeding was reopened, similar interrogatories were again sent, with a view to securing results of operation and other data for each year from January 1, 1913, to January 1, 1918. Answers were received, and the information secured will be discussed hereinafter.

Origin and development of private cars

For the purpose of this discussion, a private car will be considered as one not owned directly by a railroad company. When railroads were first chartered and built in this country, they were simply toll roads. The shipper furnished the vehicle and the railroad company the road and the motive power. The shipper paid for the use of the roadbed, rails and motive power. By 1845, this manner of conducting railroad transportation had completely changed, and the railroad companies furnished all the facilities used in transportation. This continued until shortly after the Civil War, when fast freight lines were organized for the movement of through cars over various lines of railway in the country. They were owned by independent companies or corporations. The cars were specially constructed with movable trucks, so that the body of the car and its contents
1354 could be moved from one railroad to another without unloading, as was the general custom. The tracks of the different railroads often were, at the time, of different gauges. These car lines

quickly became popular and profitable, and were in a short time absorbed by the railroad companies. There was some use of privately owned cars as early as 1867, but it was not until about 1885 that sufficient of them were in use to make them a factor to be reckoned with in the transportation problems of the country. In 1889, an investigation of private cars and car lines was made by the commission, and the results are discussed in the annual report to the Congress of that year. An investigation into the relations of railways and the owners of private cars was made by the commission in 1892, which is referred to in its annual report of 1893. The early reports of the commission contain discussions respecting rates on oil in tank cars, as compared with oil in barrels, but the present proceeding is the first general investigation undertaken by the commission into the ownership and operation of all private cars, the relation of the owners of such cars with the railroads of the country, and the relation of owners to each other and the public.

In the development of freight traffic in the different sections of the country it became evident that many commodities might be transported to much greater advantage in certain kinds of cars especially adapted to the character and peculiar qualities of the particular articles than in the ordinary cars furnished by carriers. The latter were slow to respond to the demand for improved cars of special pattern and frequently failed to provide them. Hence, by agreement between shipper and carrier, the former undertook to provide his own cars for the transportation of his particular articles. In analogy to the custom that prevailed between connecting carriers in respect to the use of each other's cars, the railway company became the hirer of the shipper's cars, paying for their use on the basis of a certain amount per mile on the loaded, or loaded and empty, movements. Initiated in a small way with respect to a few articles, the development has been in the direction of rapidly expanding use of private cars. It became necessary that some industries should have a constant and adequate supply of cars in order to conduct business on a large and economical basis. Articles of a perishable nature required prompt movement; some of such articles moved during short periods of each year; and there were demands for cars of special type from many different sections of the country which the carriers could not, or did not, supply. It has also come about that private cars now in use are not owned by shippers alone. They are owned in large numbers by separate corporations, who make their arrangements for the use of the cars with shippers and procure from the railroads the payment of mileage. Many of these companies lease cars to railroad companies, receiving only the mileage allowance for their use; others lease their cars to carriers for an agreed monthly rental, the latter to keep the cars in repair; still others lease to shippers at an agreed rental per month, and credit the mileage earnings to the latter. Many of these concerns are car builders, who supply cars of special design to shippers on order. They have facilities for repairing their cars located at convenient points in different parts of the country.

For convenience the car owners who furnished information in answer to the interrogatories sent out in 1913 were divided into four classes, as follows: Class A, independent companies not owned or controlled by railroads or shippers; class B, incorporated car lines owned or controlled by railroads; class C, incorporated car lines owned or controlled by shippers; and class D, industrial concerns whose cars are owned by them and are used in connection with and incidental to their commercial activities. In 1913 answers were received from 641 private-car owners. Under the grouping they divide as follows: Class A, 37 owners; class B, 6 owners; class C, 22; and class D, 576. Car ownership changes frequently, and it is difficult to make an exact analysis of the number of cars or owners at any given date. New cars are constantly put into service, the old cars are scrapped or wrecked, and new industries are established in various parts of the country which require cars of their own to conduct their business with efficiency.

January 1, 1918, there were approximately 1,000 owners of private cars of all kinds used in commercial service in this country, not including railroad companies. The number owned by each ranges from 1 to 18,000. According to Boyd's I. C. C. A-826, effective December 14, 1917, a publication designed to show gallonage capacities of tank cars of the country for the computation of freight charges, there were 706 owners of tank cars, not including railroad companies. On January 1, 1913, there were shown by the same publication 271 owners. No tabulation of the answers to interrogatories sent out in January of this year has been made to indicate the number of owners in groups as was done in 1913. It may be said that an examination of the returns, in a general way, shows that there has been no substantial change in the number of owners in the different groups since January 1, 1913, except a large increase in class D owners. None of the returns includes cars that are used about industrial plants for interplant switching, those used by contractors in connection with construction work, cars in the hands of manufacturers and builders, or cars which may be used in interstate commerce but which in fact are not so used. The following table shows the number of the several kinds of freight cars owned
1356 on January 1, 1913, by private interests, compared with like cars owned by railroads:

Kind of cars	Owned by private interests	Owned by railroads	Total
Refrigerator	14,582	44,959	59,541
Tank	34,000	9,130	43,130
Stock	21,712	71,309	93,021
Coal and coke	24,140	605,042	629,182
Hopper	510	640	1,150
Live poultry	600	114	714
Other kinds	1,366	1,370,132	1,371,498
Total	137,170	2,301,711	2,438,881

There are no statistical data compiled by the commission previous to 1889, which give reliable information as to the number of cars owned by other than railroad companies, nor, in fact, the number of different kinds of cars available for use in interstate transportation actually in operation. Poor's Manual shows that in the year 1890 there were 3,398 refrigerator cars owned by railroad companies. On October 1, 1889, railroads owned 1,342 tank cars. Ind. R. Ass'ns. Tit'vl. and Oil City v. W. N. Y. & P. R. R. Co., 5 I. C. C. 415, 435. As shown above, on January 1, 1913, railroads owned 48,926 refrigerator cars and 9,150 tank cars. January 1, 1918, railroads owned approximately 65,000 refrigerator cars and 11,277 tank cars.

In 1889 there were 6,552 privately owned tank cars; in 1912, 30,022; and in 1918, approximately 70,000. It was stated at the hearing in February of this year that there were about 6,000 tank cars under construction. The number of tank cars now privately owned is an approximation because it is difficult to ascertain the exact number. Ownership constantly changes, new cars are added, and there is some duplication in the reports for the reason that both the owner and lessee sometimes report the same cars. Boyd's I. C. C. A–826, and supplements above referred to, shows a total of 85,260 tank cars in use in this country. Of these, 12,217 are owned by railroad companies. An examination of this publication discloses some duplications. From the figures obtainable from answers to interrogatories, and estimates from other sources, there appear to have been about 67,880 privately owned tank cars on January 1, 1918. Allowing for duplications in Boyd's publication, and for failure to report by owners to questions sent out by the commission, it is probable that 70,000 is substantially the correct figure.

In 1910 there were approximately 50,000 privately owned refrigerator cars; in 1912, 54,582; and on January 1, 1918, approximately 65,000. These figures are approximates, because it is difficult to keep up with the constant changes of ownership, cars that
1357 are added, and those that are scrapped each year. For example, in February of this year Swift & Company were manufacturing at their shops in Chicago four new refrigerator meat cars every day.

January 1, 1913, there was a total of 137,179 of all kinds of cars owned by private interests. This includes those owned by railroad-owned car lines. January 1, 1918, there were approximately 135,000 tank and refrigerator cars so owned. Add to this 65,000 other privately owned cars, including stock, coal, poultry, heater, palace stock cars, and box cars, and the total ownership on that date was approximately 200,000. At a conservative estimate, the amount of money invested in these cars is $250,000,000. In addition to this, large sums of money have been invested by owners in the construction of repair plants, side tracks, etc.

There has been a large increase of privately owned cars in the last three years. This increase is relatively larger than for any previous

similar period. This is particularly true of tank cars. During that period there has been an unprecedented shortage of cars on railroads of the country, caused in part by the enormous increase in demand for certain articles, due to the war; and, also, in part to congestion of cars along the North Atlantic seaboard and at important terminals in official classification territory.

The congestion caused much slower movement of cars. It is estimated by one large car owner that it now requires three cars to perform the service that was performed by one in normal times. It quickly developed during the shortage that if large owners of private cars were to do the same or a greater amount of business than in previous years it would be necessary for them to buy or manufacture more cars and put them into service, and many of them have done so.

Private car lines

Railroad-owned car lines are in a different situation than those owned or controlled by shippers or independent companies. Examples of such lines are the Pacific Fruit Express, owned jointly by the Union Pacific and Southern Pacific systems; the Santa Fe Refrigerator Despatch Company, owned by the Atchison, Topeka & Santa Fe Railway Company; the American Refrigerator Transit Company, owned by the Missouri Pacific and Wabash in the ratio of 76 to 24, respectively; and the Chicago, New York & Boston Refrigerator Company, owned by the Grand Trunk Railway system. The cars owned by these companies are interchanged with carriers other than the owners, exactly the same as all railroad cars, except payments for their use, and the cars are "at home" on the lines of the owning carriers. They are more properly to be termed railroad cars. All charges to the shipper in connection with the
1358 operation of the cars of these companies are published in tariffs of the owning carriers and concurred in by their connections. The officers of the railroad companies are generally officers of the subsidiary car lines. The employees of the latter ride on passes, and freely use the railroad telegraph lines. It is stated in evidence that these lines were organized chiefly for the purpose of looking after perishable freight originating on the lines of their owners, and that they are really a separate department of such carriers. Separate incorporation, it is asserted, is a convenience in accounting and operation. It seems quite probable that one strong inducement for the incorporation of some of them was that at the time mileage earnings were much greater than had been received from the per diem allowance, which in 1902 was 20 cents.

The Merchants Despatch Transportation Company, formerly owned by the New York Central, and the Central Fruit Despatch Company, formerly owned by the Illinois Central, are not now operating. The cars owned by them are now operated directly by the railroad companies.

Some of the carrier-owned lines now in operation receive nothing but mileage earnings, and the earnings from refrigeration, where they perform the service for the owning companies. Others are paid a commission, usually 12½ per cent of the gross revenue received by the carriers with which they have contracts, on business solicited and secured by their employees, and routed via the contract carrier lines. Examples of these are the American Refrigerator Transit Company and the Chicago, New York & Boston Refrigerator Company. Solicitors employed by these car lines are experts, and advise farmers and other shippers as to the production of more varied and larger quantities of fruits and vegetables, and assist and advise shippers of dairy products in various ways to prepare shipments for transportation, as to loading, etc. They are comparable to soliciting forces that have been employed by carriers which have perishable freight departments of their own, such as the Chicago, Burlington & Quincy and the Pennsylvania.

With respect to the commission paid these car lines, there is no evidence which permits of a comparison between the amount paid them and the cost of soliciting dairy products and other perishable freight by carriers owning their own cars, to determine whether they are excessive. The figures submitted by the car lines which receive commissions do not show that their earnings are more than reasonable, considering investment and expenses. For example, the Chicago, New York & Boston Refrigerator Company reports that its percentage of return on investment, less operating expenses, maintenance, salaries, taxes, and depreciation, was 6 per cent in
1359 1909; 5 per cent in 1910; 4.5 per cent in 1911; 5.7 per cent in 1912; 2.8 per cent in 1913; 1.7 per cent in 1914; a deficit of 0.63 per cent in 1915; 1.9 per cent in 1916; and a deficit of 3.1 per cent in 1917. The American Refrigerator Transit Company has not received a return on its investment except five years in the last ten, and not to exceed 2.52 per cent in any year of that period.

It does not appear that connecting lines pay commissions to secure shipments in cars owned and operated directly by carriers. The Chicago, New York & Boston Refrigerator Company, as before stated, has an arrangement with the Grand Trunk system. A shipment reaching New York City over the Lehigh Valley, originating on the Grand Trunk, if solicited by the Chicago, New York & Boston Refrigerator Company, would entitle the latter to a commission on the entire movement, the Lehigh Valley having received a shipment, without individual solicitation, that it might not have secured.

In any event these charges do not affect the amount paid by the shipper for the transportation, and, because the car lines are owned by railroad companies and the earnings are a part of the returns from the entire service of the company, they are not directly at issue in this proceeding. The evidence is not sufficient to determine any question with respect to the propriety of commissions and their payments, as described.

At this time, when the railroads of the country are under unified control, paid soliciting forces for any carrier have little office to perform. Whether as industrial agents they may continue to operate in the interest of more and a wider diversity of production is another question not within the scope of this investigation or the commission's authority. Under such circumstances, the question of payment of commissions of the nature referred to will not be further considered herein.

With reference to car lines owned by shippers, it may be said that generally they are not engaged in the car-leasing business. The cars they own are used to transport their shipments, and it is only occasionally that cars are leased to others. However, there was one exception to this general rule. When this proceeding was instituted, a subsidiary of Armour and Company, of Chicago, Ill., and Kansas City, Mo., known as Armour Car Lines, supplied the owning company with cars for shipment of its fresh meats and packing house and dairy products, and also furnished cars to carriers and shippers for transportation of fruits and vegetables. During the pendency of this investigation, and on November 1, 1914, the Armour Car Lines sold to Armour and Company all of the meat refrigerator cars owned by it, and the shipper has operated them since. By contract dated November 5, 1914, the Armour Car Lines sold to the Fruit
1360 Growers Express, Incorporated, all of the fruit and vegetable refrigerator cars owned by it. The icing stations owned and operated by the Armour Car Lines at East St. Louis, Ill.; Columbus, Ohio; and Altoona, Pa., with its interest in other stations at Del Ray, Mich.; Havelock, Ont.; Nashua, N. H.; and Newport, Vt., were sold to the Utility Operating & Supply Company, Incorporated. Armour and Company controls the Fruit Growers Express under the following conditions: The stockholders of the Fruit Growers Express, except directors' qualifying shares, are the same as the stockholders of Armour and Company, and they hold their stock in the same proportion as the stockholders of Armour and Company hold stock in that company. It is insisted that the fact that the stockholders of the two companies are the same does not make one the subsidiary of the other, as stated in the report proposed by the examiner. Technically this is true, but the fact remains that the Fruit Growers Express is controlled by Armour and Company. The offices of the former are at the Union Stock Yards, Chicago, in Armour and Company's building. The Utilities Operating & Supply Company is controlled in the same way by Armour and Company. Armour and Company now conducts in its own name the meat transportation business in its own cars that was formerly done by Armour Car Lines; the Fruit Growers Express has taken over the fruit and vegetable transportation business that was formerly conducted by Armour Car Lines; and the Utility Operating & Supply Company now controls and operates icing plants that were formerly owned and operated by Armour Car Lines. In other words, the three companies are

controlled by Armour and Company, and have taken over the business than was formerly done by Armour Car Lines. The Fruit Growers Express leases its cars to carriers for the most part on agreed bases, and performs refrigeration service at rates named in such carriers' tariffs.

There is another class of car lines which deals almost exclusively with carriers. Reference is had to the Mather Horse & Stock Car Company and the Doud Stock Car Company, which are representative of the class. These companies own stock cars which are leased to railroad companies under contracts as to payment for their use, or their cars are secured by carriers on payment of 6 mills per mile. Much the larger number of these cars are operated under the mileage allowance. Shippers are in no way interested in the arrangements that are made between the owner of such cars and the carrier. The shipper secures such cars on request to the carrier. When used by carriers they are really railroad cars and are treated as such by connections, and oftentimes the lettering on the cars is obliterated and the name or initials of the leasing carrier placed thereon. Some cars owned by companies of this class are leased to shippers under
1361 contracts, but the charges therefor are not uniform. The amount paid by carriers for the use of cars of this class which is now under control by this Commission, does not affect freight charges paid by shippers, or practices of carriers with reference to such shippers. However, this record shows that under present conditions, and, indeed for many years, the mileage allowance is not and has not been on a remunerative basis to the owners. The evidence is not sufficient to determine what payment should be made to this class of owners, who derive no benefit from the use of their cars except the mileage or other payments. The carriers and this class of owners should, if possible, reach an agreement as to the reasonable payment for the use of cars.

Diversity of use and make of private cars

There are at least 31 different liquids regularly transported in tank cars, not including the different kinds and grades of acids and oils. There are 7 acids and 21 grades and kinds of petroleum oils, making an aggregate of 59 varieties of liquids. Cars used to transport the different liquids can not be interchanged readily, that is to say, a tank car loaded with fuel oil with an asphalt base can not be reloaded with refined oils, such as gasoline or kerosene, nor with edible oils, such as cottonseed or coconut, without thorough cleaning at an expense of from $5 to $35 per car. A car in which has been transported any of the petroleum oils can not be used for molasses or other edible liquids without thorough cleaning to remove every vestige of oil and odor. Some acids require peculiarly constructed cars. A car for tannic acid must be coated on the inside with acid resisting material and all fittings must be of brass. Muriatic acid requires

a wooden lined tank. Wine cars are mounted with a steel tank, lined on the inside with special enamel, surrounded on the outside with a wooden tank, with insulating material between it and the steel, to preserve the contents from deterioration during transportation; and casing head gasoline cars are insulated so as to preserve a uniform temperature, and are fitted with special dome-head arrangements and safety appliances. A tank car for transportation of asphalt and other heavy oils requires heater coils in order to liquefy the contents for unloading. Some tank cars are constructed with compartments so that two or more grades of oil may be transported at a time. Special loading and unloading facilities are necessary for oil shipments. It is necessary to force some oils out of the cars by steam pressure, others by the use of pumps, and from still others the liquid flows out by gravity.

Dairy and meat products may not safely be transported in a refrigerator car in which fish, sea food, or other odoriferous
1362 articles have been carried, without thorough cleaning and disinfecting. A refrigerator for the transportation of carcass meat is peculiarly constructed. The roof is braced to support racks from which are suspended hooks to hold the meat. It is more thoroughly insulated than the ordinary refrigerator. The car is cooled by means of iron brine tanks in each end, which are filled with crushed ice and salt, insuring a lower temperature than can be secured in a car with wooden bunkers filled with cake ice without the use of salt.

Palace stock cars fitted with stalls for the shipment of blooded stock; stock cars with feeding racks and watering troughs; live poultry cars with 128 coops, so wired and arranged that poultry may be fed and watered and otherwise cared for en route; heater cars with stoves or other heating apparatus for shipment of potatoes in winter; rack cars for shipment of bark, barrels, staves, and coke; platform cars for shipment of car bodies, car trucks, and electric cars; flat cars for boilers, machinery, tanks, trucks, vans, etc.; and special slot or "pocket" cars for large sizes of plate glass are some of the private cars regularly used for special purposes.

The perfection of the construction of the refrigerator car has in recent years led to its wider use. Originally it was designed for transportation of perishable traffic in the warm months. It has become quite as important an agency of transportation of traffic in cold months, to keep the articles contained in it from freezing. A modern insulated car will transport articles for longer distances in cold weather without damage than the ordinary box car. Refrigerator cars of modern make are now demanded by shippers who have come to realize that their shipments are delivered in much better condition, with less loss and damage, than was the case a few years ago with the cars of the earlier type. Not only is the demand for the best cars of this character, but it is highly important that they shall be kept in as near perfect repair as possible.

Allowances paid by carriers

Previous to 1902, the payment for the use of all cars in railroad service was on a mileage basis. In that year, for the use of railroad cars on foreign lines, a per diem basis was established, beginning at 20 cents, with a penalty of 80 cents per day if the car was detained more than 30 days; from July, 1906, to July, 1907, the per diem charge was 25 cents, with a penalty of 75 cents per day on cars held for more than 30 days; July, 1907, to March, 1908, 50 cents per day; March, 1908, to March, 1910, 25 cents; March, 1910, to August 1, 1910, 30 cents; August 1, 1910, to Jan. 1, 1913, 35 cents; January 1, 1913, to January 1, 1917, 45 cents; from January 1, 1917, to March 31, 1917, 75 cents; and from March 31, 1917, to date, 60 cents.

1363 Allowances paid to private car owners have always been on a mileage basis. From 1867 to 1873, the rate was from 1½ to 2 cents per mile on all cars; 1873 to 1877, from 1 to 1½ cents; in 1877, it was made from ¾ of a cent to 1 cent; in 1893, an allowance of 1 cent was fixed for refrigerator cars west of Buffalo, N. Y.; in November of that year, the rate was made 6 mills on all cars except private refrigerators, which were allowed 1 cent by western carriers and ¾ of a cent by eastern carriers generally. There were some modifications of the allowances in the east. For example, in 1909, refrigerator car owners were allowed 1 cent on movements from St. Louis to the Illinois-Indiana State line, and the Wabash Railway paid 1 cent on movements to Buffalo. There were certain other exceptions, not necessary to be stated. On October 1, 1917, the allowance for use of refrigerator cars between all points east of the Mississippi River became 1 cent. At this time, the allowance for refrigerator cars is 1 cent per mile on the loaded and empty movements between all points east of El Paso, Tex., Albuquerque, N. Mex., Salt Lake City, and Ogden, Utah. The territory west of the described line is known as the transcontinental zone. In that zone, on shipments requiring refrigeration in private cars for distances of 800 miles or less, the payment is 6 mills per mile; excess over 800 miles, ¾ of a cent; when loaded with freight not requiring refrigeration, 6 mills, regardless of distance; and when moving empty, no allowance. The reasonableness of the allowances in the transcontinental zone is the subject of complaint in Docket No. 10626 and subnumbers, heard in connection with this proceeding, and will be disposed of in a separate report.

The allowance on live poultry cars is generally ¾ of a cent, although there are a few exceptions when 6 mills is paid. On palace stock cars except when moved in passenger trains, the allowance is on the basis of 6 mills per mile, with the exception of many railroads in the southeast, which allow ¾ of a cent. The allowance for tank cars is uniformly ¾ of a cent for loaded and empty movements. For use of all other cars, including coal, coke, stock, and box cars,

the allowance is 6 mills per mile. None of the allowances include movements within the switching limits, as defined by carriers, within terminals.

Operation of private equipment

From the fact that private car owners have an interest in the prompt movement of their cars, records submitted in this case show that such cars move more rapidly, and also move empty to a greater extent than the same kind of cars owned by carriers. From exhibits submitted it is shown that private cars on 127 railroads of the country for the year ended June 30, 1912, made empty and loaded mileage as follows:

1304 Kind of cars	Loaded	Empty	Loaded	Empty
	Miles	*Miles*	*Per cent*	*Per cent*
Refrigerator	760,157,619	373,021,082	67.1	32.9
Tank	169,982,947	105,146,526	61.1	38.9
Live poultry	5,304,986	5,894,407	50	50
Stock	78,223,726	71,969,134	52.1	47.9
Coal and coke	104,562,271	103,537,181	50.3	49.7
Other private cars	6,217,523	6,316,008	49.3	50.7
Total	1,013,939,264	665,573,216	60.40	39.60

For the same year the loaded freight car mileage of steam railroads in the United States amounted to 69.41 per cent of the total, and the empty mileage 30.59. These figures do not include caboose mileage, but do include all freight cars in revenue service, both railroad cars and private cars. They also include company freight. It will be observed that the loaded mileage of all freight cars is about 15 per cent greater than that of private cars. The two lots of cars are not fully comparable, however, for the larger movement of private cars is for perishable freight, which is everywhere given preferred service, but the comparison is worthy of consideration in connection with other facts and circumstances. The following exhibit, compiled from returns received from carriers in 1913, shows a comparison of loaded and empty mileage of refrigerator cars owned by shippers and those owned or controlled by railroad companies over certain representative railroads for the year ended June 30, 1912:

Railroad	Cars of lines owned or controlled by shippers		Cars of lines owned or controlled by railroad companies	
	Loaded	Empty	Loaded	Empty
Chicago & Erie	56.9	43.1	73.9	26.1
Erie	52	48	77.1	22.9
P. R. R.	51	49	69.1	30.9
P., C., C. & St. L.	55.6	44.4	59	41
C. & N. W.	54.6	45.4	70.9	29.1
C., B. & Q.	63	37	86	14
C., M. & St. P.	53.9	46.1	77.3	22.7

It will be noted that in every instance the percentage of the loaded mileage of the railroad-owned car lines is greater than that of the car lines owned by shippers.

A comparison of the per cent of loaded mileage of refrigerator cars operated by railroad-owned car lines on the roads of the owning railroad with that of refrigerator-car lines operated by shippers is as follows:

1365 Loaded mileage on the Missouri Pacific system:	Per cent
Made by cars of the American Refrigerator Transit Company	66.7
Made by cars operated by shippers—	
Armour Car Lines	60.8
Cold Blast Transportation Company	52.4
Cudahy Refrigerator Line	56.8
Cudahy Milwaukee Refrigerator Line	53.9
Kingan Refrigerator Line	76.7
Morris & Company	63.9
St. Louis Independent Packing Company	50.7
Swift Refrigerator Line	61.3
Loaded mileage on the St. Louis-San Francisco Lines:	
Made by Frisco Refrigerator Despatch cars	72.3
Made by cars operated by shippers—	
Armour Car Lines	68.6
Cold Blast Transportation Company	56.6
Cudahy Refrigerator Line	59.1
Cudahy Milwaukee Refrigerator Line	61.5
Kingan Refrigerator Line	67.8
Morris & Company	73.7
St. Louis Independent Packing Company	54.8
Swift Refrigerator Line	62.2
Loaded mileage on New York Central lines:	
Made by cars of the Merchants Despatch Transportation Company	80.6
Made by cars operated by shippers—	
Armour Car Lines	56.6
Cold Blast Transportation Company	51
Cudahy Refrigerator Line	50
Cudahy Milwaukee Refrigerator Line	51
Kingan Refrigerator Line	52
Morris & Company	50
St. Louis Independent Packing Company	50
Swift Refrigerator Line	51.4

It is further shown by the returns that the loaded mileage of the Pacific Fruit Express over the Union Pacific-Southern Pacific lines was 70.3 per cent, and of the Santa Fe Refrigerator Despatch Company over the Santa Fe lines 83.6 per cent.

The figures are taken from the returns to the commission for the year 1912, which may be considered as a normal year, so far as car supply and movement are concerned.

From figures secured from answers to interrogatories sent out in 1918, the following tables have been compiled:

1366	Refrigerator mileage reported by carriers				Refrigerator mileage reported by private owners			
Year	Loaded		Empty		Loaded		Empty	
	Miles	Per cent	Miles	Per cent	Miles	Per cent	Miles	Per cent
1913	813,720,160	63.9	436,944,911	36.1	707,107,374	93.1	50,113,042	6.9
1914	946,099,196	64.9	474,187,126	35.4	630,729,731	76.7	194,891,548	23.3
1915	983,976,109	61.1	562,079,449	38.9	553,219,191	62.0	339,047,037	38.0
1916	936,339,951	63.4	534,695,239	36.6	477,133,568	56.7	362,447,157	43.2
1917	918,708,791	62.6	549,319,039	37.4	494,603,139	56.6	378,851,725	43.4

Year	Tank car mileage reported by carriers				Tank car mileage reported by private owners			
	Loaded		Empty		Loaded		Empty	
	Miles	Per cent	Miles	Per cent	Miles	Per cent	Miles	Per cent
1913	165,984,980	51.5	156,038,777	48.5	99,495,702	50.7	96,850,771	49.3
1914	173,000,716	51.0	166,860,852	49.0	101,871,908	50.3	100,689,158	49.7
1915	207,950,764	51.1	199,329,902	48.9	139,942,823	50.7	135,885,317	49.3
1916	273,075,719	51.1	261,230,104	48.9	201,165,256	50.6	196,739,973	49.4
1917	34...,473,779	51.2	324,681,629	48.8	279,634,907	50.6	273,280,562	49.4

The figures are for the private car lines and owners and railroads reporting. They do not contain all the mileage, loaded or empty, made by all the refrigerator or tank cars in the country. They are, however, representative, and may be taken as showing the situation with substantial accuracy.

It will be observed that the loaded and empty mileage made by privately owned refrigerator cars in 1913 is at variance with that of the other years. The reason for this is that the figures submitted for that year by 95 per cent of those making returns did not segregate the loaded and empty mileage movements. The figures are based on the 5 per cent that did report such movements, and are, therefore, not reliable, and may be discarded. To a less extent the same situation exists with respect to the year 1914.

It will also be observed that the percentages of loaded to empty movements are substantially the same for the entire period of six years. This shows that whether there be a shortage of cars or not, the empty movement of refrigerator cars under the system of their operation now in effect is substantially constant. The inability of carriers to secure return loads and the insistence of shippers for prompt return of their cars are influences that affect the result.

The percentage of loaded mileage of railroad-controlled refrigerator cars is relatively high. In many cases it is higher than the average of all loaded freight-car mileage of the country, 69.41 per cent. The loaded and empty mileage of refrigerator cars owned and operated directly by railroad companies was not obtain-
1367 able, but so far as cars owned or operated by their car line are concerned, the records show reasonably efficient operation. These cars appear to be used to about the same extent as ordinary box cars. Refrigerator cars are used primarily for perishable freight, but when suitable freight of a general character is available for return loading, they are utilized. Most perishable freight moves from the west, southwest, south, and southeast to the northern and northeastern sections of the country. There is very little perishable freight available for return loading. Railroad car lines utilize their cars to as great an extent for return loading as possible. Private car owners object to return loading of their cars, if by so doing, the return movement is delayed. There are many articles that can not be loaded into refrigerator cars, especially meat cars, because of

odor, or because the dampness in the car would not permit of such loading. The tariffs of carriers designate a list of articles that are not to be loaded into refrigerator cars, and also contain general inhibitions as follows:

"Articles not to be loaded in standard refrigerator cars, meat cars, or standard ventilator cars: Any freight liable to damage from dampness or rust; and freight the odor of which may unfit the cars for transportation of perishable freight; and any rough or heavy freight that may damage car walls or floors."

Then follows a list of 24 commodities as the principal ones within the restriction above cited. Tank cars are not generally loaded for return movement, and with some exceptions move empty half the total mileage. The Union Tank Line Company serves so many concerns with numerous refineries and stations in all parts of the country that it occasionally happens that loads may be found for movements in both directions. As a rule, private cars designed to transport acids, vinegar, wine, etc., move empty on the return.

Phases to be specially considered

In an investigation so general as this, where all questions with respect to the operation of private cars on all railroads of the country are to be taken into account, it became necessary to specify the more important phases of the matter to be considered. In the order that was issued in January, 1918, certain points were designated as those to be given special consideration, and to them the evidence taken at the last hearing was in the main directed. In brief, they include the question of the propriety of a service or separate charge, in addition to the freight rate, when special equipment is transported by carriers; to ascertain, in case a carrier has no equipment of the kind demanded by a shipper, whether the carrier should secure the same from an owner of such car, or whether the shipper should be
1368 permitted to make the arrangements with the owner, and thus supply cars for his own use; to determine whether, if private car owners are permitted to continue to furnish cars to shippers and make charges direct to them, the charges so made shall be published in tariffs of carriers; to determine what compensation should be paid by carriers to the car owner, lessor, or lessee for the use of cars furnished, and the manner in which charges shall be determined; to ascertain what relation investment in private cars, interest, cost of operation, maintenance, and depreciation should bear to the allowance to be paid by the carrier for the use thereof; whether charges for refrigeration should be a stated sum for the service, or named in cents per 100 pounds of freight hauled, or should be based on the cost of the service, including labor, cost and weight of ice and salt, etc.; the propriety of the line-haul carrier performing all refrigeration service and making charges therefor; whether rules and practices of carriers as to minimum weights and charges, mixtures,

part-lot shipments, return of empty containers, etc., operate to unduly prefer or prejudice any shipper or shippers, or any particular description of traffic; to investigate questions respecting demurrage; and to determine whether the Master Car Builders' Association rules, with respect to private cars, should be filed with the commission and observed by carriers accordingly.

The different phases of the case will be considered in detail, not necessarily in the order listed above, nor in exact terms as stated, but in such a manner that each will have such discussion as its importance and the facts warrant.

The duty of carriers

It is well-settled law that the duty of a common carrier is to furnish equipment for transportation of articles it advertises to carry. The general duty of carriers at common law, and under the act, is to furnish such cars and other facilities as are reasonably necessary to enable them to fulfill their public obligations. It has been held that in the absence of discrimination the power to enforce the duty does not reside with the commission. Pennsylvania R. Co. v. United States, 227 Fed. 911; United States v. Pennsylvania R. R. Co., 242 U. S. 208. In this proceeding the question of where the power resides to enforce the duty is not necessarily involved. In section 15 of the act it is provided that if the owner of property transported directly or indirectly renders any service connected with transportation, or furnishes any instrumentality therein, the charge and allowance therefor shall be no more than just and reasonable, and that the commission is empowered to determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the service rendered, or for the use of the instrumentality furnished.

1369 An amendment to section 1 of the act, approved May 29, 1917, provides as follows:

"The commission shall, after hearing, on a complaint or on its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier, and the penalties or other sanctions for nonobservance of such rules.

The Congress has thus recognized the use of privately owned cars in transporting the commerce of the country, and has provided for their control by the commission through rules and regulations of carriers hauling them.

For more than 30 years privately owned cars have been extensively used to transport commodities in interstate commerce. They came into use originally because the railroads would not, or did not, supply them in sufficient quantities to meet the demand. Practically all carriers have refused to furnish tank cars for transportation of oil and other liquids, or cars with brine tanks and racks for transportation of carcass meat. There are certain exceptions to this rule

which will be considered later. Refiners of petroleum oils with substantial unanimity state that as a practical matter carriers could not furnish tank cars in a manner to insure their efficient use. The packers, who are the largest users of refrigerator cars, including meat cars, state that they are perfectly willing that carriers should own all cars used by them, "provided they are insured at all times an adequate supply." The proviso qualifies their acceptance of the principle to the extent of practically nullifying it. If all cars were owned and furnished by carriers, in times of shortage the packers, as well as all other shippers of like traffic, would be entitled to no more than their fair share of all cars available. No class of cars in railroad service is used more effectively than the cars owned by large shippers. They have organizations of men to see to it that their cars move as promptly as possible, both loaded and empty. The carriers of the country could not as effectively handle the entire refrigerator and tank-car equipment as is now done by the intervention of private owners. The car lines have forces of experts to watch the crop prospects and to advise as to the needs of particular sections of the country, to secure cars and see that they are on hand for the transportation of all sorts of products in refrigerator cars. If there is a crop failure in one section of the country, the cars are sent to other sections, and are kept actively in use to the highest degree possible. The oil refiner produces certain kinds of oil and desires to reach certain customers. No carrier could inform itself as to his needs and insure that he would have the kind and number of cars to enable him to conduct his business economically and
1370 efficiently. If private ownership or control of cars of particular types results in greater economy and more efficient use, the whole public is to that extent benefited. As before stated, nearly 200,000 cars regularly used in interstate commerce are now held in private ownership. According to the statistical abstract compiled by the commission for the year ended July 1, 1916, there were 2,313,300 freight cars of all kinds owned and used by carriers of the country. It is probable that this amount is short about 20,000 of the number owned by carriers on January 1, 1918, and assuming that on that date the total equipment of railroad-owned cars was 2,500,000, it follows that about 8 per cent of that number is privately owned.

In the beginning, carriers could no doubt have insisted upon their right to furnish all equipment. They did not do so, and in the course of years there has grown up a system of private ownership of such magnitude and importance that it must be reckoned with as an existing condition. Some years ago certain car lines were owned by shippers, who received commissions from carriers transporting their traffic. This was unlawful as a concession to such shippers from published rates. No such commissions are paid at this time, nor have there been for many years. It also appears that some years ago carriers paid excessive allowances for use of cars to certain shippers, which amounted to rebates, but so far as this investigation has shown, there are no payments of that character now being made.

The handling of private cars is now on such a basis that there does not appear to be any unlawful practice, so far as payments by carriers to shippers are concerned.

There is a demand upon the part of certain shippers of petroleum oil that the commission require carriers to furnish tank cars on request, and that the supply of such cars be subject to ordinary rules of equitable distribution. The contention is that if the commission has not the power, it should be given it by proper legislation.

The system of the use and supply of private cars that now exists can not be at once and radically changed, without serious consequences to shippers, carriers, and the public. At the hearings an endeavor was made to secure evidence with respect to normal transportation conditions. The abnormal conditions of last fall and winter are admittedly not such as would indicate what would be just and reasonable practices, as a general rule, for carriers, shippers, private-car owners or the public.

How should a shipper secure cars?

As a general principle, a shipper of traffic over the railroads of the country ought not to be required to deal with any other than the carrier. If the carrier has not the kind of a car in general
1371 use that is demanded by a shipper, the most simple and direct method is for the former to secure it from some source and furnish it, but the custom has been otherwise with respect to certain kinds of cars. In many cases shippers are under compulsion to furnish cars by reason of carriers' failure to supply them upon request. In practice the shipper either buys the cars used by him or rents them from concerns engaged in the business of supplying cars. If a request were preferred to a carrier for a kind of car it did not own, considerable delay might occur before it could be secured. To a shipper of perishable products or a shipper who is bound by a short-time contract, such delay might cause serious loss. So far as the carrier is concerned it can make no difference whether the shipper is owner or lessee. So far as the shipper, or the relation of one shipper to another is concerned, there may be a marked difference between an owner and a lessee.

Some car companies engaged in the business of manufacturing cars and supplying them to shippers for use in transportation have and take a vital interest in the movement of such cars by carriers. They enter into contracts with shippers to supply them with all the cars needed for a certain period, usually a term of years. Men are employed whose duty it is to keep posted as to the location of all cars, so that demands of patrons may be most expeditiously and economically met. In many instances they require junction reports as to passing of cars sent to them, and they collect mileage due and credit it to the lessee's account. There can be no doubt but that this method of handling the business leads to a highly efficient use of cars. These car owners may not, and, in fact, usually do not, have

any interest in or control of the lading of the car or its destination, but they find it necessary to follow their cars about, and by all means in their power they attempt to expedite the movements to enable them to meet their contract obligations out of the total number of cars they own. Because of this, they have a special interest in the transportation service rendered by carriers. Shippers realize that through the efforts of such organizations they secure a larger use of the cars they lease, and for that reason find it more satisfactory to lease than to own them. Where single shippers own but few cars, it is not practicable for them to so organize their forces as to secure prompt movement and return of cars. Larger owners have organizations to look after the movements of cars and this promotes their prompt movement en route and through terminals. They have representatives at important junction points who advise as to movements and look after the prompt handling of cars.

As before stated, it is undoubtedly in the interest of all shippers that needed cars should be secured from the carrier direct, but
1372 so long as the system of the use of privately owned and operated cars continues to play so important a part in transportation by railroad in this country, and so long as carriers fail to provide themselves by ownership or lease with cars to transport so important a part of the commerce moving over their lines, there seems to be no sound reason why shippers should not continue to secure cars through independent car companies. The need is to secure the largest use of all freight equipment, and the car companies have been an important agency in this regard.

Should car owners publish their charges to shippers?

Charges of car owners to shippers range from $15 to $150 per car per month. The lower charges are on unexpired long-time contracts and will not be renewed under present conditions. Five years ago, the average rental charge was about $30 per month. In 1917, the average contract was made at $85 per month. It is stated by the General American Tank Car Corporation on argument that the average of all its contracts for the year 1917 was $37.50 per month. The higher average charge is justified, it is asserted by car owners, because of increased cost of materials and labor. Except as to a few car companies, there is no regularity with respect to charges car owners make for equipment leased or furnished shippers. The amount of the charge seems to be measured by the needs of the particular shipper. During recent months there has been such a demand for cars that owners admit that they have received very high prices for single trips or other short-time use. In normal times there is not such demand, and the charges are much less.

The Union Tank Line Company, formerly a subsidiary of the Standard Oil Company, and, under the decree of the Supreme Court, a separate corporation, is the largest owner of tank cars in the country. It owns about 18,000 at this time. Its cars are all

used in petroleum-oil service, and are for the most part leased to former subsidiaries of the Standard Oil Company. Its charges are uniformly the same to all users of its cars, and its contracts are made for periods of not less than six months. The company undertakes to supply all the cars a particular lessee may need during the period of the contract. In 1912, the charges of this company were as follows: For a car of 8,500 gallons capacity and over, $3 as an initial charge for furnishing the car, and 75 cents per loaded day. That is to say, the per diem charge was assessed when the loading began and continued until the car was made empty. For cars of less than 8,500 gallons capacity, the charge was $2.50 for furnishing the car, and 50 cents per loaded day. On January 1, 1918, the charge was as follows, the change have been made during the year
1373 1917: 1¾ cents per 100 gallons per loaded day, based on the capacity of the tank, plus three times 1¾ cents per 100 gallons for each time the car is loaded. The charge of 1¾ cents per 100 gallons runs from the day the loading is commenced until the tank is made empty. Thus, the charge for 8,000 gallons per day would be, under the new rates, $1.40, as compared with 75 cents under the old rates, and $4.20 for furnishing the car, as compared with $2.50. No figures are at hand to compare in actual practice the new charges with the old, but it will be observed that they are nearly twice as much. It is asserted that increased costs of all kinds warrant the higher charges. For cars designed for shipments of casing head gas and naphtha, highly explosive articles, the charge is double that for an ordinary tank.

The General American Tank Car Corporation owns about 5,000 tank cars which are leased to shippers for use in general service of transportation of liquids. The larger number of its cars are continuously used for the transportation of petroleum oils, but many of them are of special design and used to transport acids, wines, cottonseed, and coconut oil, etc. Many of the contracts of this company provide for the payment of rental for a number of years, usually five, when the car becomes the property of the lessee. Its charges are not uniform; that is to say, more will be charged for a wine or an acid car than for a petroleum car, dependent upon the cost of the car, the length of lease, etc. Its representatives testified that for similar cars leased and moved under the same circumstances and conditions, the charges are always the same. Most of the cars of this company are leased for long periods, although it makes occasional short-time or trip arrangements.

The North American Car Company owns about 400 refrigerator cars and 600 tank cars. Most of its refrigerator cars are leased to railroads on a monthly or yearly basis. Leases of both refrigerator and tank cars are made to shippers on contract. The terms do not appear of record.

Tank cars for transportation of cottonseed oil or other seasonable articles are, in the main, used by the owners to transport their own

traffic, but they lease them at times when not in their own service for any price they can secure, which, of course, varies with different seasons and the needs of the lessees.

It is important that charges which affect the total amount paid by shippers should be uniform under the same circumstances and conditions. The total charges may and doubtless do affect the sale price of the article, and the consuming public has an interest in them. In other words, the public always has an interest in the transportation cost of articles consumed.

1374 Under the law as construed by the courts, car lines and others engaged in leasing cars to shippers are not common carriers and thus do not come under direct control by the commission. When a car, regardless of ownership, is being moved in interstate commerce by a common carrier subject to the act, there is no doubt of our power to control the carrier's operation of the car so that there shall result no undue preference to any shipper. The act does not impose on common carriers the obligation to haul private cars in interstate commerce. If private cars are used, they must be under an arrangement stated definitely in tariffs. Proctor & Gamble Co. v. C., H. & D. Ry., 19 I. C. C. 556, 560.

No one has complained so far as this record shows of the amount of the charges for lease of cars, or that the charges are applied in an unjustly prejudicial manner. As a means of removing undue prejudice or unjust discrimination we have the right to require the carrier to provide specifically in its tariffs the terms under which all similarly situated shippers may demand and secure upon even terms the use of cars employed upon the carrier's line. We do not feel that on the facts of this record or under present conditions the requirement should be ordered.

Should a separate charge for special equipment be established by carriers?

This was one of the questions that was thoroughly discussed at the hearings and is fully considered on brief. The first difficulty is to define "special equipment" or "special car." Carriers define "special equipment" to be that which "does something to the freight," or that which has a value to the shipper over and above the mere hauling, the definition to apply to a car furnished by a shipper as well as one by a carrier. It is stated by carriers that the most important factor to be taken into account in determining whether a car is or is not special is the superior service which it affords the shipper. It is conceded by them that the purpose of a separate charge for furnishing special cars is to reimburse them for the service rendered which is not included in the freight rate, and to remove any discrimination that may be found to exist because a better car is furnished one shipper than another.

It is insisted by shippers that whether the equipment is or is not special as to its construction has nothing to do with the question at

hand. They concede that if the freight rate for the transportation of any article is based upon its movement in a particular kind of a car, and upon request a carrier furnishes one of more expensive construction and one that is more difficult to operate, it is entitled to
1375 be paid for the additional service. A familiar illustration of this situation is found in the rates on potatoes from the northwest. Cases involving this point have been decided by the commission. Protection of Potato Shipments in Winter, 29 I. C. C. 504; Rental Charges for Insulated Cars, 31 I. C. C. 255. It appears in those cases that originally potatoes moved only in box cars, and that the freight rates were based on that kind of equipment. Later, carriers were called upon by shippers to furnish refrigerator cars. The commission approved an additional charge for furnishing such cars on the ground that the freight rates were based on movements in box cars, and that the carriers, when they furnished refrigerator cars, were entitled to receive additional compensation because of the more expensive construction of the car and the greater service to the shipper.

It is further contended by shippers that if an attempt is to be made to define special equipment for handling of which the carrier should make a separate charge in addition to the rate for transportation, the real test should be the extent of the use of the particular kind of a car. No doubt a car of a peculiar type when first used might be considered special equipment because of its construction and design. If later that type of car should come into general use throughout the country, and move a steady and heavy volume of traffic, it would lose its special character. It is not contemplated by carriers that every car which is differently and more expensively constructed than a flat or box car should be considered a special car. A coal car is everywhere considered an ordinary car, but there are several types, differing in cost, and requiring distinct loading and unloading facilities. In United States v. Pennsylvania R. R. Co., supra, the Supreme Court, at page 222, after reviewing the decisions of the commission with respect to its duty and power to require carriers to furnish cars, said:

"This then was the view of the Interstate Commerce Commission of the duty of carriers and its power over them; that is, that it was the duty of carriers to provide and furnish equipment for transportation of commodities and that this duty might expand with time and conditions, the special car becoming the common car, and the shipper's right to demand it receiving the sanction of law."

It is suggested by carriers that they should be permitted to charge a sum in addition to the freight rate when cars of special design are used to transport articles of any kind. A representative of one of the leading carriers of the country suggested that there should be at least three charges for transportation of certain kinds of traffic. He was of opinion that there should be one charge for shipments in a box car; a higher charge when the same kind of shipments were transported in a ventilator car; and a still higher charge when in a

refrigerator car. This contention is not entirely new. In re
1376 Transportation, etc., of Fruit, 10 I. C. C. 360, 373, decided in 1904, the commission said:

"We think that it is the duty of the respondent railroad companies to furnish refrigerator cars for the transportation of this fruit. While it is possible that these carriers might at the outset have legally declined to provide this special kind of equipment, they ought not to be permitted to do so at this time. For years they have voluntarily made such provision; and this industry has grown up upon the strength of that arrangement. Such cars are generally furnished in all parts of the country when required for this species of traffic. While a refrigerator car costs somewhat more than an ordinary box or flat car, the additional expense is not great. Railroads at this day might as well decline to provide stock cars for the transportation of livestock as refrigerator cars for the carriage of perishable commodities."

In numerous decisions of the commission it has been held that the published rates of carriers include the furnishing of refrigerator or other cars of special design. An example is to be found in Arlington Heights Fruit Exchange v. S. P. Co., 20 I. C. C. 106. In that case the contention was made by the carriers that the charge for refrigeration should include compensation for the use and the cost of maintaining a car of that type. In answer to this contention, the commission, at page 108, said:

"In determining the freight rate this fact has been taken into account; that is, the rate applied on shipments under ventilation has been adjusted in view of the fact that a refrigerator car, more expensive than the ordinary box car, must as a practical matter be employed. Hence, in determining the additional sum which the shipper who has the benefit of refrigeration should pay, nothing should be added by reason of the fact that a car of this type is used."

In substantially all rate cases of any importance that have been considered by the commission relating to articles transported in refrigerator or other cars of peculiar type, carriers have defended their rates by showing more or less in detail that the commodities are transported in such cars, of greater weight, and more expensive to operate than ordinary cars. These facts thus called to the attention of the commission have not been ignored in passing upon the reasonableness of the rates in issue in the particular cases. Certain articles were not transported in appreciable quantities, and from certain parts of the country not at all, until after the refrigerator car was perfected, and freight rates were made with a view to transportation of such products in that kind of a car and in no other. The wide diversity of traffic and the special transportation that many carriers perform would make a car special in one section of the country, or over one railroad, that would, in another section or over other railroads, be an ordinary car. A carrier which transports nothing

but lumber would not of necessity own a hopper-bottom coal car; one that hauled nothing but coal need not own a refrigerator car;
1377 one that had no livestock shipments would own no stock cars; and one that transported fruits, vegetables, and grain only would not possess a tank car. It was suggested at the hearing that carriers might specify in their tariffs the cars they hold themselves out to furnish, and that all other kinds of cars would be considered special by that carrier. Under the system of through rates in this country, such special charges would result in nothing but confusion in tariff publications and lead to uncertainty in amount of freight charges to be paid by shippers or receivers.

As illustrative of what might be done should a charge be authorized for supplying equipment of a special type, the American Refrigerator Transit Company, on or about February 1, 1918, notified certain users of its refrigerator cars that in the future a charge of $7.50 would be made for furnishing a car. A like notice was not sent to all shippers, but it was stated that it was the intention to make such a charge where shipments do not move under stated refrigeration charges. The American Refrigerator Transit Company is railroad owned, and its charges are all published in the tariffs of its owners and contract lines. The contention is that the subsidiary company acts in a dual capacity, in that it acts as the agent of the carrier in soliciting shipments and for itself in furnishing cars. The proposed charges have not been collected or published in the owning carrier's tariffs, but the incident is sufficient to show possible complications should charges for furnishing certain cars be sanctioned.

As before stated, many of the rates now published by carriers include the transportation of articles in cars for the hauling of which carriers here assert they are entitled to extra compensation. It would be practically impossible to determine what rates do or what do not include the hauling of commodities in special types of cars. Any attempt to state separate charges of the nature proposed would be a prolific source of litigation, and, in many instances, would impose unjust and unreasonable charges on shippers or receivers of freight.

Basis of compensation for use of private cars.

When a shipper furnishes his own car for transportation of articles in common use and which move in large volume, he relieves the carrier of so much of its obligations as a common carrier. This is true whether the shipper furnishes the car as owner or lessee. Carriers recognize this and make allowances to the owner or controlling shipper, as before stated, for the use of such cars. The question here to be considered is as to the basis of the allowance or payment therefor. When this case was first heard, the only power of
1378 the commission to regulate payments by a carrier for an instrumentality of transportation furnished by the shipper

was the power given in section 15 of the act to determine what is a reasonable charge as the maximum to be paid by the carrier. This provision was directed to the prevention of rebates by way of excessive allowances to shippers, and has never been considered as granting power to fix a reasonable amount as an initial proposition as payment for the use of the car. The act of May 29, 1917, hereinbefore referred to, grants power to the commission to fix the compensation to be paid for the use of any car not owned by the carrier.

Carriers contend that the amount paid for the use of shippers' cars should not exceed that sufficient to cover repairs and depreciation, and that therefore some of the allowances are now too high. Car owners contend that the allowance or payment now made for the use of their cars is too low, and that it should be in such an amount as to provide for maintenance, depreciation, cost of operation, taxes, and a reasonable interest on the investment. To the last contention there is one notable exception, the General American Tank Car Corporation. On brief it is stated on behalf of this corporation that although it is contended by some shippers that ownership and control of tank cars is of no peculiar advantage to them, the position taken is not entirely sound. The shipper who is assured of the exclusive use of a tank car, and consequently of the condition of the tank for the receipt of his lading, enjoys an advantage not afforded by a system in which, if the cars were furnished by railroads, he would not have such exclusive use of the car, and for this advantage the shipper ought to bear some proportion of the cost of ownership and maintenance. It is the opinion of this corporation that the proportion which the shipper should bear must of necessity be arbitrarily fixed, and if the shipper receives enough to cover repairs, depreciation and cost of operation, he would secure adequate compensation. It is the further opinion of this company that in normal times 1¼ cents per mile for the loaded and empty movements of the car would be sufficient to cover the suggested items.

On the other hand, 90 per cent of the tank-car owners insist that payments for use of cars should be sufficient to cover interest on investment, depreciation, cost of operation, cost of repairs and cost of maintenance, and all elements that may be included to reimburse the shipper for the cost of furnishing a car which the carrier, under the law, is bound to furnish. It is conceded by these interests that while it is the duty of a carrier to furnish the cars, as a practical matter the fulfillment of the duty is surrounded by many difficulties. These tank-car owners prefer to furnish their own cars, and they assert it would be impracticable for carriers to do so. Preserving a car
1379 for the character of oil handled on its previous trip enables the refiner of oil to eliminate delays in cleaning and transferring cars around from one railroad to another, delays that would be expensive to the carrier, and which it could not in actual practice prevent. It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds

of oil, gasoline and residuum, requires two kinds of cars. Another refiner producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars. The cost of cleaning a car which has been used for fuel oil, in order to make it fit for handling gasoline, is very great. These and other reasons which are given in detail and might be here repeated, if necessary, have led to the system of private ownership of tank cars throughout the country generally. In fact, carriers as a rule provide in their tariffs that where tank cars are used they must be furnished by the shipper, or that the carrier does not obligate itself to furnish such a car. It is argued in behalf of these tank-car owners that in permitting the refiner to furnish his own cars, the railroad company performs no transportation service, and that the latter is refraining from performing its legal duty because it can not do it efficiently. It is asserted that any advantage that the oil shipper may have from the ownership or control of tank cars is due to his own ability to perform a service for the carriers which they do not perform, and that they could not perform as cheaply or efficiently. The compensation due the owner or controller under such circumstances is the cost to him of the facility furnished. The cost of furnishing a tank car is analyzed from all standpoints, and the conclusion is reached by them that the payment should not be less than 2 cents per mile on the loaded and empty movements.

With respect to payment for use of refrigerator cars, the packers, while not conceding that the payment of 1 cent per mile on the loaded and empty movements is sufficient at this time, are willing to continue on that basis with a view of testing it under normal conditions of transportation. Other refrigerator car owners insist that any allowance or payment below 1½ cents per mile on the loaded and empty movements is unreasonable and unjust. All contend that the payment for the use of the car should be sufficient to cover the cost of operation, maintenance, depreciation, and a reasonable return on the investment. It is argued that if a shipper is forced by a carrier to use his own cars the compensation should be adequate; that if the compensation is not equal to the cost of furnishing the car, the result is that the shipper who has to use his own car is paying more to obtain transportation than the shipper who obtains the use of a railroad car; that the furnishing of a car being a transportation
1380 service, the entire cost thereof should be covered by the payment made by the carrier for the use of it; and that any other basis will result in unjust discriminations.

The amounts paid by carriers for the use of tank cars or refrigerator cars does not permit of the operation of any of them at a profit considered reasonable by owners, and has not during any time during the last six years, and some of them were and are operated at a loss, taking into account a return on investment, cost of repairs, maintenance, and depreciation.

It is clearly established that shippers of petroleum oils, fresh meat, packing-house products, and dairy products could not have done the volume of business they have done in the past, or that their plants

were constructed to do, except they had possessed themselves of private cars over which they could exercise, and have exercised, control. The refiner of oil or the meat packer could no more do business on an economical and efficient basis without his private cars than he could without his modern equipped refining or packing plant. The private car part of the business has grown with the rest. Doubtless, in the beginning, demands were made by these shippers that carriers should supply tank and meat cars, but it was quickly demonstrated that business could not be done in the most effective manner were carriers to own or control cars of that kind. As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so. The oil refiner and meat packer demand an adequate supply of cars at all times. It is conceded by shippers that neither an adequate supply nor its efficient distribution can be afforded by carriers. The requirement has been that there shall be the most efficient use of tank and refrigerator cars, which has been one of the results of private ownership. While this has undoubtedly been of benefit to carriers, it has been of incalculable benefit to shippers as well.

The allowance that shall be paid for the use of private cars under all the circumstances and conditions shown must be considered on the average. There can not be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately owned cars. Representatives of carriers assert that a proper basis is payment for repairs and depreciation. Carriers should at least pay for repairs and such depreciation as occurs while the car is in railroad service. The amount of depreciation can not be determined with accuracy. The attempt to fix a stated basis of allowance for use of privately owned cars would by no means result in justice to all owners or to all carriers.

1381 The experience through many years under normal conditions has dictated certain allowances which have been accepted by owners and carriers. Changed conditions have led to an attack upon the allowances now paid by carriers. It has been suggested that the measure of the allowance should be the amount the shipper saves the carrier. In other words, what would it cost the carrier to furnish the particular car; and how much less does it cost the carrier when the shipper furnishes it? This amount is not ascertainable from the record. Doubtless the allowance would vary, if put on that basis, as between different carriers and shippers, and also as between different kinds of cars. No attempt will be made here to fix what shall be a reasonable basis from which the amount of the allowance to be paid by the carriers shall be ascertained. This phase of the case will be considered in the light of past experience and the evidence of record.

The discussion has been chiefly with reference to privately owned refrigerator and tank cars because they are more largely used than

any others, but the principles announced are applicable to all, with certain exceptions referred to hereinafter.

How should the compensation be determined?

Substantially all parties to this proceeding agree that the mileage basis upon which payments are made for the use of private cars should be continued. A number of private car owners stated that they had no objection to payments on a per diem basis, provided the amount was sufficient to pay the cost to them of furnishing the cars. As before stated, payments by carriers for use of private cars have always been on a mileage basis. In 1902, when carriers changed the basis of payment for foreign cars on their own lines from the mileage to the per diem basis, the question of making a similar change with respect to private cars was considered. It was concluded at the time that payments for use of private cars should not be on a per diem basis for the reason that it is very difficult to establish at all times when a private car is or is not in railway service; that there would be a great temptation to favor one private car line or owner over another by moving cars a little slower for one or the other, or by leaving the cars of certain owners on sidings and forgetting them; and that at the time the per diem was agreed upon as between carriers it was fixed at 20 cents, which was known to be too low, and it would have to be increased. The increased per diem rate would have meant largely increased payments to certain car lines and owners which at the time were not justified in the opinion
1382 of carriers generally. Changes in per diem rates are frequent, as heretofore noted, and the amount fluctuates from lower to higher sums, dependent on the car supply of the carriers as a whole. The number of tank and meat cars owned or controlled by shippers are usually dictated by the amount of business each does, and are for the most part adequate for the service. For a short time the per diem was 75 cents per day. On February 1, 1918, it was 60 cents. This amount would materially increase payments on tank cars and other private cars, and on refrigerator cars as well, except those used for the transportation of fresh meat and other highly perishable food products.

To change the basis of compensation for use of private cars would create great uncertainty as to what the per diem should be, whereas, with the experience of years under the present system, the results from operation may be estimated with substantial accuracy. The private car owner now receives payment for the operation of the car. While standing on a consignee's siding or on the siding of a carrier payments do not accrue. The latter situation is of considerable importance when the necessities of transporting certain commodities are considered. For example, fruit and vegetables of a superior quality and in large quantities are grown near the Mexican border in Texas. It is necessary, in order to meet the requirements of shippers from that region, when the crops are good, to have not

less than 3,000 refrigerator cars on hand early in each year, in order that they may receive shipments during an exceedingly short shipping season. Cars are sent down to that region and placed on side tracks awaiting loading. It is not possible to send the necessary number at one time. The cars are sent from all directions, care being exercised to move them empty the shortest distance possible. Some of them may remain on sidings for weeks before being loaded. The same situation exists with respect to shipments of canteloupes from Colorado, and berries from Louisiana and Arkansas.

Some consideration was given to the question whether charges should be computed only on the loaded movement, on the theory that this might induce more loading on the return movement. Of course, this ought not to affect the amount of the payment. If it is now on the proper basis the change would mean a double charge for the loaded movement. In special movements of private cars for vegetables, canteloupes, berries, and the like, there is nothing to be hauled when the cars are sent forward for loads. At the eastern seaboard there is always a surplusage of empty cars. The predominant loaded movement is to the east from the west, southeast and southwest. The handling of the empty car causes nearly as much damage to the car for which repairs are necessary as the
1383 loaded movement, and there is little difference in the depreciation during the period of each movement. It was not claimed by carriers that payments should be made on the loaded movement only.

There is no serious difficulty in making settlement as between owner and carrier on the mileage basis. Under present rules, loaded and empty mileage is equalized as regards routes of movement. That is to say, the shipper is required to give each route, or each carrier in the route, a loaded mile for each empty mile of haul, under penalty of paying rates for hauling empty equipment only, which range from 4 cents to 10 cents per mile. Whether under unified operation, should it become permanent, some other rule in this regard may be necessary, is a matter that can not be determined here. Under normal conditions the mileage basis secures to the owner payment for the operation of his car. That is what he is entitled to and it is that for which the carrier should pay.

Deductions from mileage by private cars through terminals are now made. Mileage is calculated from switching limits to switching limits. On a shipment starting from Chicago for New York, the mileage is computed from the outer switching limits of Chicago to the western limits of the Toledo switching district; then from the eastern limits of Toledo to the western limits of the Cleveland, Ohio, switching district; then from the eastern limits of the Cleveland district to the western switching limits of the Buffalo, N. Y., district; and so on to the outer switching district of New York. This is the usual method of computing the mileage earnings on all private cars. It is stated that the practice of carriers is not uniform, and that

some of them, where the shipment moves over one line, compute mileage from switching limits of the point of origin to the switching limits of the destination. It is the general rule not to make payment for the movement through switching districts of important points. Many years ago when switching limits were not as extended as to-day, the matter was of no especial importance. To-day it is possible to have a movement through Chicago of over 30 miles within the switching limits, and 10 or 12 miles is by no means uncommon in other cities of the country. Car owners do not urge that payment be made for the use of their cars in switching service. Their demand is that they receive payment for line hauls. This is reasonable, and is not objected to by carriers. The computation of mileage as a basis of payment for private cars should be upon the distance of the haul, with reference to distance tables established by carriers. The practice with respect to such payments should, of course, be uniform.

1384 Amount of the compensation

It is conceded by car owners that they are not properly entitled to make a profit on their cars used by carriers. They demand, as a rule, that the entire cost to them, together with interest on their investment, shall be covered by payment for their use. A return sufficient to pay all costs, including interest on the investment, has not been realized from the payments or allowances now made by carriers. Returns from representative owners for the year 1912 are shown in Table 1 in the appendix. This exhibit does not show the investment in any other property of private car owners than the cars. No account has been taken of investment in repair shops, sidings, etc.

It was not possible to secure exact figures in each instance, but the table may be accepted as representative of the general situation in normal times. Since 1912 the cost of cars and repairs has materially increased, and there has been little change in the mileage earnings. If anything, during 1917 the movement has been less than in previous years because of congestion, embargoes, etc. While the figures are not at hand, priority orders that have been given for shipments of food products to the Atlantic seaboard for shipment abroad have not so materially affected the mileage earnings of the packers during recent years as compared with other private car earnings. Table 2 in the appendix gives the investment, cost of repairs, mileage earnings, and depreciation at 5 per cent of certain representative owners of refrigerator, tank, and other private cars for each year from January 1, 1913, to January 1, 1918. The figures in this exhibit are computed on the basis of the returns made by the owners, except the depreciation, which in each instance has been computed at approximately 5 per cent on the reported investment in the cars. It is to be observed that the figures may not be exact, because of the character of the returns made by the owners. It is insisted by car owners that 5 per cent is not sufficient to cover depreciation. The life of the average refrigerator and tank car is from 8 to 15

years. Some kinds of tank cars and other private cars have to be practically rebuilt in a short time, frequently less than eight years. However this may be, the table may be used for the purpose of indicating the representative financial results to owners on the basis herein suggested.

Owners receive larger returns for refrigerator than for tank or other kinds of cars. The reason for this is that perishable freight requires rapid transportation to prevent deterioration. It moves in the fastest freight trains of all carriers. Packers and car lines who are largely engaged in shipping perishable commodities insist on the prompt movement of their cars, both loaded and empty. Tank
1385 cars do not usually move with equal rapidity. The shipments are not perishable and do not require expedited movement, nor do they ordinarily get it, except in special cases. Large users of tank cars, however, have organizations to keep the cars on the move as continuously as possible. The packers have branch houses in all important cities of the country to which shipments are made in large quantities. For example, Swift & Company have 450 of such branch houses. The shipments of the packers to New York City and for export constitute about 25 per cent of the total.

The cost to the carriers of moving tank cars or refrigerator cars has not been determined. The average tank now in use holds 8,000 gallons, and the average load weighs 55,000 pounds. The average load in a refrigerator car weighs about 30,000 pounds. Including the ice, the weight would be about 34,000 pounds. The service of the carrier on the loaded movement of a tank car is greater than on a refrigerator car, and the average earnings are also greater. A proportion of refrigerator cars contain return loads, and tank cars return empty in most instances. The investment in a tank car is about the same as in a refrigerator car, and repairs by the owner to a refrigerator car usually exceed those to a tank car.

As before stated, in all that part of the country east of the transcontinental zone, the payment for the use of a refrigerator car is 1 cent per mile on the loaded and empty movements. In that part of the country east of the Mississippi River the payment for refrigerator cars was increased from $\frac{3}{4}$ of a cent to 1 cent per mile on October 1, 1917, on the suggestion of the American Railway Association after consideration of a demand therefor by owners. For more than 30 years tank-car users and owners have received $\frac{3}{4}$ of a cent on the loaded and empty movement.

Owners of tank cars contend that the rate was fixed many years ago when the cars cost about $1,000; and that if the allowance was proper at that time, it is inadequate now when cars, even on a normal basis of charges, cost from $1,500 to $1,600. The cost of repairs and maintenance of tank cars has steadily increased. The same is true of refrigerator cars. As before stated, the average carload of oil to-day weighs about 55,000 pounds. Twenty years ago the average

load was about 24,000 pounds. In other words, the average load has increased two and one-half times, and the revenue of the carriers per car mile has more than doubled.

The following table gives average cost of cars for each year from 1912 to 1917, both inclusive:

1386 REFRIGERATOR CARS

	Carrier owned		Privately owned	
	Number	Average cost	Number	Average cost
1912	[1] 49,936	[2] $1,182.01	34,582	[3] $964.0
1913	55,184	1,203.18	34,985	926.2
1914	61,291	1,200.41	36,167	950.7
1915	61,673	1,207.05	35,911	1,041.6
1916	61,694	1,240.87	35,531	1,025.2
1917	60,475	1,255.52	36,375	1,090.0

TANK CARS

1912	9,150	(4)	20,699	[3] 993.2
1913	9,041	$1,186.79	21,300	1,078.0
1914	8,715	1,208.90	22,071	1,097.0
1915	9,139	1,215.01	28,000	1,099.2
1916	9,339	1,221.13	33,223	1,170.0
1917	8,636	1,267.37	44,141	1,370.0

[1] Based on reports from 127 representative railroads.
[2] Based on 24,949 cars as reported.
[3] Based on 7,719 cars as reported.
[4] None reported.
[5] Based on 15,392 cars as reported.

Cars purchased in the latter part of 1917 cost on the average about $3,700. The marked increase is due to increased costs of material and labor and is not a measure for costs in normal times.

A large owner of tank cars testified that the average cost of tank cars in 1913 was $1,100, and in 1917 prices ranged from $1,650 to $3,755 per car during the earlier and latter parts of the year. He stated that under the ¾ of a cent allowance the average earnings in 1914 were $63.09. The cost of maintenance, including depreciation, plus 6 per cent on the actual cost less depreciation, amounted to $158.74 per car; that is to say, during the year 1914 the mileage failed to pay expenses and a 6 per cent return on the investment by $95.65 per car. In 1914, in order to secure a return of 6 per cent on depreciated investment, and to pay operating expenses, the mileage allowance should have been 1.89 cents; in 1916, 1.65 cents; and in 1917, 1.75 cents. The Union Tank Line Company shows that the average cost of repairs to its cars in 1914 was $65.07, and that depreciation at 5 per cent was $42.70, a total of $107.77. At 1 cent per mile, the average earnings of its cars would have been $91.97, or $15.80 less than cost on the basis stated. In 1917, according to returns from this company, the average cost of repairs was $49.07 per car; depreciation at 5 per cent, $42.58 per car; and the mileage earnings were $80.87 per car. It is stated that much of the equipment is new, and repairs are on a minimum basis.

In figures set out in table 1 of the appendix, the earnings of Swift & Company on refrigerator cars in the year 1912 appear. This company may be taken as representative of the packers. The returns from mileage received by them are the highest of any refrigerator cars in private ownership. The following table gives the average earnings and depreciation at 5 per cent on the average value per car, together with the total for the years 1915, 1916, and 1917:

1387

Year	Cost	Mileage earnings	Repairs	Depreciation	Total depreciation and repairs
1915	$866.36	$191.10	$138.81	$44.82	$183.63
1916	916.34	204.52	158.71	45.81	204.52
1917	893.09	197.51	186.77	44.50	231.27

The average daily movement of tank and refrigerator cars, and, in fact, of any private car, is difficult to ascertain with accuracy. In the appendix to this report, table 3 gives the performance of private cars of different kinds operated for owners or lessees, compiled from reports submitted in 1913. It shows movement of refrigerator cars to be from 39 to 86 miles per day. From other figures in the record, it appears that cars of the packers have the largest daily movement, approximately 75 miles. Some of this apparently rapid movement may be accounted for in part by the fact that products shipped by them frequently move in trainloads from the Missouri River and Chicago to New York, and that empties are returned in the same manner. The cars in trains do not encounter delays at break-up or classification yards. Fruits and vegetables do not ordinarily move as rapidly as fresh meats. It is probable that the average movement of refrigerator cars is from 45 to 50 miles per day. Fruits and vegetables from California to points east of the Mississippi River move about 60 to 65 miles per day, but the hauls are unusually long, and the movement of them is not fairly representative.

The average daily movement of tank cars is equally difficult to determine. The record shows various average movements of different owners from 15 to 40 miles per day. The average, on the whole, appears to be about 25 miles per day.

Very little evidence was submitted with respect to privately owned coal and coke cars. It was asserted that the increased cost of cars and repairs entitled the owners thereof to a greater allowance than 6 mills per mile now paid. There are a large number of coal and coke cars privately owned in official classification territory. In other sections of the country there are but few that are not furnished by carriers. On this record, what would be a reasonable allowance to the owners of private coal and coke cars can not be determined.

Live poultry and palace stock cars are specialized to a high degree. It is doubtful if carriers could be required to furnish them.

1388 They have, however, developed a large and remunerative traffic, and carriers have always paid owners for their use.

Discrimination in use of private cars

Because of their superior organization, and their ability to give carriers tonnage, the leading packers of the country have been able to secure better use of their cars than some of their competitors. These great shippers of perishable articles have used to the fullest extent their splendidly effective organizations to secure prompt service for their cars used in shipments of their products. Smaller competitors who have not, and can not afford to have, such organizations, have secured very much less efficient service from the private cars they own or control.

An Iowa packer who leased 20 cars for shipment of carcass meat in 1917 gave the operation of 6 of his cars as follows:

Shipped	Days held	Rental per car	Earnings
June 27, 1917	177	$118.46	$31.36
July 19, 1917	149	99.04	26.17
September 12, 1917	68	44.94	14.10
September 16, 1917	108	69.75	27.30
September 19, 1917	105	66.45	31.32
September 21, 1917	111	73.04	30.04
Total		470.68	156.29

It will be noted that the first car was not returned to him for nearly six months. A representative of this packer testified that this car and other cars were not tied up in congested terminals, but were in use for the various periods shown by carriers in hauling traffic for others. He stated that it was impossible to get his cars returned in any reasonable time.

A small packer at Birmingham, Ala., attempted to ship carcass meat to the Northeast, including such points as New York, Boston, and Pittsburgh, Pa. An exhibit filed by him shows that cars were not returned to him within 15 days from any point north of the Ohio River, and that they were detained for periods ranging on the average about 30 days, some being held for 66 to 90 days. He was unable to secure enough mileage payments to meet his rental charges. He endeavored to secure cars from the carriers, but when these were once loaded they remained away for long periods and he could secure no others. He was, therefore, unable to continue the business. A packing concern at Cleveland, Ohio, also had trouble in getting cars controlled by it returned to its plant. The failure to return cars to the smaller packers is due to the neglect of a lawful
1389 duty by carriers. The obligation to treat each shipper fairly, no matter how small his shipments may be in comparison with those of another shipper, is one carriers can not escape. Whether under the terms of the act the carriers have been guilty

of unjust discrimination in the cases referred to, can not be determined on this record. The duty imposed on the carrier by law is to give equal treatment to all shippers who are in position to demand it. Where the same carrier or carriers serve two shippers, who, by their location, the character of their output, and distance from markets where their products must be disposed of, are in substantially similar circumstances and conditions, the serving carrier or carriers can not lawfully prefer one to the other in any manner whatsoever.

Meat packers everywhere are under compulsion, if they are to ship carcass meat, to supply themselves with cars, and carriers transport them under arrangements with the shippers. If the carriers were required to publish in their tariffs a rule to the effect that private cars when unloaded at destination, unless otherwise ordered by the owner or lessee, will be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee, doubtless much of the apparent injustice hereinbefore referred to would be avoided. A rule similar in terms to that suggested was applied by carriers with respect to foreign cars on their lines previous to April 26, 1917, but it was not applicable to private cars.

Shippers of oil in tank cars are required to furnish the cars, and many shippers of perishable products other than fresh meat find it necessary to own or control cars, because they can not in any other manner secure an adequate supply. The suggested rule should apply to all private cars in order to prevent discrimination, and to secure to owners such use of their cars as their necessities may require.

Carriers throughout the country generally have provisions in their tariffs which name rates on petroleum oil and other liquids in tank cars that they are not under obligation to furnish such cars. Other carriers provide that shippers must furnish tank cars. Notwithstanding this many of them have cars which are used in commercial service. For example, the Pennsylvania Railroad system owns 448 tank cars, and rates named for transportation of liquids in tank cars are governed by the official classification, which provides that

"In prescribing ratings in this classification for articles in tank cars the carriers whose tariffs are governed by this classification do not assume any obligations to furnish tank cars."

The Atchison, Topeka & Santa Fe system owns 2,965 tank cars and leases 100, making a total of 3,065. Its rates on articles transported in tank cars are governed by the western classification, which provides that

1390 "Where the classification provides ratings on commodities in tank cars such ratings do not obligate the carrier to furnish tank cars in case the carrier does not own, or has not made arrangements for supplying such equipment."

The Pennsylvania acquired its tank cars many years ago. At first they were operated by a subsidiary company known as the Green Line. It owned about 1,200 cars. In 1902, the Pennsylvania Railroad

began operating the cars itself. At that time it had 625 cars. Since about 1880 none of the equipment that was operated by the Green Line or the Pennsylvania has been renewed by purchases of new cars. The cars were purchased when there were no oil pipe lines to the seaboard, and the purpose for which they were acquired was the transportation of crude oil from the Pennsylvania oil fields to the seaboard. On the completion of the pipe line, for a time there was but little use for the cars, but they are now used to transport refined oil. The cars owned are not sufficient to meet the demands of shippers at points on the Pennsylvania lines at any time. It is stated by a representative of the carrier that the number owned nearly meets the demand after refiners have used their own equipment. In other words, it is stated that the railroad-owned cars, supplementing those privately owned, nearly meet the demand. In March, 1914, the railroad company owned 495 cars, and at that time they were not sufficient to supply the demands of shippers, even with increased private ownership. It is asserted to be somewhat difficult to make distribution of limited equipment or any equipment for the oil traffic of to-day, and it is admitted that the Pennsylvania is frequently short of oil cars to meet the demands of its shippers. It is also stated that one of the reasons why the Pennsylvania had not acquired more tank car equipment was because very few railroads had such cars, and those it owned were scattered over the country beyond its control and it received no like cars in return. The cars owned by the Pennsylvania are now divided into assignments for various grades of oil. Out of the number owned in March, 1914, 200 cars were assigned to transport refined oil and naphtha; 100 for light lubricating oil or neutral oil; and 143 for heavy or black lubricating oil. A few of its cars are in its own use for the transportation of creosote. The cars are confined to the oil business, no tank cars being furnished by the Pennsylvania for shipment of any other liquid.

The cars owned by this company are of relatively small capacity. That is to say, its equipment on March 1, 1914, consisted of 77 of 5,500-gallon capacity, 163 of 4,500-gallon capacity, and 255 of 3,600-gallon capacity. The newest car it possessed at that time was 5 years old. Of course, the body and trucks have been replaced from time to time during that period. It was stated that the company did not propose to increase its tank-car equipment.

1391 The Pennsylvania has no plan or scheme for distribution of its tank-car equipment. A shipper makes a request for a car, and if the railroad does not have it, he is relegated to some other source of supply. Whatever distribution is made is through the general office in Philadelphia, but not under any defined system. The endeavor was stated to be to make as equitable a division as possible, and, as a general rule, this had been accomplished.

The Santa Fe originally purchased tank cars to carry supplies for its oil-burning engines. Its cars are not used in commercial service except occasionally. At times, however, some of its cars are supplied to shippers on request. There is no evidence that what cars are

used by shippers are distributed in accordance with any plan or system. If a shipper makes request for a car and it is available, he receives it. If it is not available, the request is refused. Numerous western carriers have or own tank cars, which when not in use in their own service are furnished to shippers.

These facts disclose an anomalous situation. Carriers who state in their tariffs that the rates they name therein for the transportation of commodities in tank cars do not obligate them to furnish cars are constantly doing so when it is for their convenience, or when they are able to do so. This situation was repeatedly called to the attention of the carrier during the hearing, but no satisfactory explanation was made by any of them.

One petroleum shipper testified that for some years he had received a supply of cars from the St. Louis-San Francisco, and they suddenly refused to furnish any more at a time when he had contracts to supply customers, and he was unable to secure more than a small share of his requirement from another carrier, and then in uncertain numbers and at indefinite times.

If shipper A should apply to the Atchison, Topeka & Santa Fe for a car, and be supplied with it, and shipper B, at the same point and on the same date, desiring to ship to the same destination, should make a similar application and be refused, it would appear on the face of it that the carrier had favored one over the other. A certain carrier might supply one shipper continuously with cars and relegate his competitor to buying his cars or leasing them. The possibility for discriminatory treatment of shippers is ever present under the existing state of carriers' tariffs. One of the main purposes of the act to regulate commerce is to make uniform, just, and reasonable all published rules and practices of carriers under them.

The situation as respects the Pennsylvania was considered by the commission in Pennsylvania Parafine Works v. P. R. R. Co., 34 I. C. C. 179, but from a different angle. In that case the question was as to the power of the commission to require carriers to
1392 acquire more tank cars when their supply was inadequate to meet the demands of shippers. The Supreme Court in Pennsylvania R. Co. v. United States, supra, held that such power was not committed to the commission. A case of discriminatory practices growing out of insufficient equipment was not considered nor passed upon. Doubtless the commission if it found any unjust discrimination practiced by any carrier flowing from the peculiar tariff situation above described could require the carrier to cease and desist therefrom. This would result, perhaps, in a refusal to furnish cars to the favored shipper, but would not be a satisfactory adjustment of the matter. In the present state of the law the commission has power to prescribe reasonable and nondiscriminatory rules for car distribution. Carriers which own tank cars should be required to distribute those it furnishes to shippers in accordance with rules and regulations published in tariffs whereby each shipper who makes reasonable request may receive his fair and proportionate share of the available cars.

Refrigeration charges

Investigation of refrigeration charges and rules and regulations governing the service was included in this proceeding because perishable freight requiring refrigeration moves largely in cars not owned directly by carriers, and the service in connection therewith is performed in many cases by independent corporations or subsidiaries of carriers. For example, the Pacific Fruit Express performs refrigeration service for the Union Pacific and Southern Pacific; the Santa Fe Refrigerator Despatch for the Atchison, Topeka & Santa Fe; and the American Refrigerator Transit Company for the Missouri Pacific, Wabash, and other contract lines. These are carrier-owned lines. The Fruit Growers' Express furnishes cars and performs refrigeration service for the Atlantic Coast Line, Seaboard Air Line, Southern, Florida East Coast, and other carriers; the Utility Operating & Supply Company owns icing stations at points north of the Ohio and Potomac Rivers and east of the Mississippi, and performs icing service at such points; and Swift & Company performs this service at various points in official classification territory. The refrigeration and reicing charges of all these companies are published in tariffs of carriers, and such charges are generally collected by the latter from shippers and remitted to the companies performing the service.

As a rule, charges for refrigeration of fruits and vegetables are in stated amounts per car, per mile, or per package, for the entire service from origin to destination. There are exceptions to this rule which need not be considered in detail. It is also a rule that charges for refrigeration of fresh meat and packing-house products
1393 are based on a rate per ton of ice and salt furnished. This statement applies to substantially all shipments east of the transcontinental zone. From Missouri River territory to north Pacific coast, Spokane, and Montana territories, the charges are based on a stated sum per car for the service. Westbound Transcontinental Refrigeration Charges, 34 I. C. C. 140. Practically all dairy products, including eggs, dressed poultry, butter, oleomargarine, and cheese in certain territories, move under tariffs which name the freight rates for transportation, including refrigeration. In other territories they move under charges for the ice furnished or under stated charges.

The rates for fruits and vegetables are named in stated amounts for the through service. The car line which receives the charge is required to pay certain carriers for the ice they furnish. For example, there is a stated refrigeration charge on oranges from the Pacific coast to New York City; a shipment from Los Angeles, Cal., to New York City via the Santa Fe and Erie is handled to Chicago, so far as refrigeration is concerned, by the Santa Fe Refrigerator Despatch Company; from Chicago to New York, the refrigeration is performed by the Erie Railroad Company; the Santa Fe refrigerator Despatch Company collects from the shipper through the carriers the through refrigeration charge from origin to destination, and pays the Erie $2.50 per ton for the ice it furnishes from Chi-

cago to New York. The same situation obtains on a perishable shipment handled by the Fruit Growers' Express from Jacksonville, Fla., to Buffalo, N. Y. The car line receives from the shipper through the carriers the published stated charge from Jacksonville to Buffalo, and performs the refrigeration service from Jacksonville to Potomac Yards, Va., both inclusive. North of Potomac Yards, the railroad which performs the refrigeration service receives $2.50 per ton of ice furnished from the Fruit Growers' Express. Thus the car lines engaged in furnishing refrigeration fix a rate based on the cost of the entire service, but carriers furnish, in many instances, a large part of the service, and are paid for the amount of ice furnished.

In 1914, 151 railroads reported that they owned and operated 1,347 icing stations. During the same year Armour interests operated 29, Swift & Company 6, and 4 were jointly owned by Swift & Company, Armour & Company, and Morris & Company. The exact number now owned and operated by carriers and others does not appear, but it is stated that there has been no substantial change since 1914.

Rates charged for ice and salt furnished for shipments of perishable freight vary in different sections of the country. Fresh meats require that the ice be crushed and mixed with salt, and fruits
1394 and vegetables do not require crushed ice or salt. The rate east of the Mississippi and north of the Ohio and Potomac Rivers is $2.50 per ton of ice furnished. If salt is required, it is furnished free. This rate is applicable to shipments of all commodities in case a separate charge is made for refrigeration or reicing. In other sections of the country charges for refrigeration of fresh meats and packing-house products are generally $2.50 per ton of ice and 40 cents per 100 pounds of salt, with a minimum charge of $1.25 for ice and 40 cents for salt for each car reiced in transit. The charge for ice furnished by railroads for shipments of fruits and vegetables is frequently higher at the same station than for shipments of fresh meats and packing-house products. At Springfield, Mo., on the St. Louis-San Francisco, the charge for reicing fresh meats and packing-house products is $2.50 per ton of ice, while the charge for other perishable commodities is $4 per ton. The same situation obtains at Mounds, Ill., on the Illinois Central, at points on the Ohio River, Birmingham, Ala., and other points in the southeast.

Some of the great packing concerns of the country now operate directly, or through corporations they control, a number of icing stations at which they re-ice their own shipments, as well as those of competitors, and any perishable commodities that require re-icing en route at the particular station. These icing stations are operated by Swift & Company and by the Utilities Operating & Supply Company controlled by Armour and Company. Some of them are owned and operated by one company, and some are owned in partnership, as above stated. Icing service in official classification territory, including New England territory, and in Canada, is performed by the packers or by corporations they control, at Michigan City, Ind.;

Benton Harbor, Port Huron, and Del Ray, Mich.; Chicago Junction, and Columbus, Ohio; Havelock and Coteau, Canada; Manchester and Karner, N. Y.; Mahoning and Altoona, Pa.; Newport, Vt.; and Nashua, N. H. At some of these points regular icing stations are operated, and at others there are simply icing platforms. In addition to those named, the Fruit Growers Express operates a number of stations south of the Ohio and Potomac Rivers, chiefly in the southeast, which are used to ice shipments of fruits, vegetables, and berries.

At all stations in official classification territory, with two exceptions, where reicing is done for shipments of fresh meats by the packers for railroad companies, the latter pay the former $2.50 per ton of ice furnished. At Altoona and Columbus, the Pennsylvania lines have an arrangement with the Utilities Operating & Supply Company for supplying ice and salt for shipments of perishable freight. At these points, the railroad company pays the operating company for reicing any carload of fresh meats $2.50,
1395 irrespective of the amount of ice and salt furnished. For shipments of other perishable freight, the railroad company pays $2.50 per ton for the amount of ice actually used and 50 cents per car in addition for the labor of placing it in the bunkers. The average amount of ice required at Altoona is from 1,200 to 1,400 pounds, for which the railroad company, at the published rate of $2.50 per ton, receives from the shipper from $1.50 to $1.75. Under such an arrangement, it appears that the railroad company loses from 75 cents to $1 per car on every car containing fresh meats that is reiced at Altoona. On each car of other perishable freight reiced at Altoona, the railroad company loses 50 cents per car, assuming that it could furnish the ice itself at $2.50 per ton, which is not free from doubt. The same condition exists at Columbus. Rates for reicing are published in tariffs of the carriers, but the icing stations operated by the packers are competitive with similar stations operated by carriers. There can be but one conclusion reached from a consideration of these facts, and that is that the packers have so located their icing stations that in the past whatever rates they have been willing to accept for the service of reicing control the rates for reicing with respect to the movement of fresh meats and packing house products. The largest volume of shipments of these commodities is from west to east, with a considerable movement to the southeast. Take for example, a shipment from Kansas City to the southeast. The short route would be over the St. Louis-San Francisco, through Springfield, Mo., where there is a railroad icing station. A competitive route would be through East St. Louis, Ill., where there is an icing plant operated by the Armour interests. Whatever rate for reicing is made at St. Louis must be met at Springfield. The same competition affects rates at Memphis and Birmingham. A shipment from Chicago to the south or southeast might be routed through East St. Louis or Columbus, at each of which points icing plants controlled by Armour and Company are operated. Railroad icing stations in competition must make the same price on pain of losing the business. It is asserted by the packers that over the northern routes $2.50 per

ton of ice furnished is ample to cover all costs in connection with re-icing, and that competition forces the same rates from west to east and to the southeast via all crossings and all routes. One answer to this is that $2.50 per ton of ice furnished, including free salt and the labor of crushing the ice and putting it in the bunkers, is not now sufficient to pay the costs even by the northern routes. Exhibits filed of record show that in 1913 certain icing stations operated by the packers and their subsidiaries in official classification territory yielded a profit. Figures were not submitted showing results in more recent years.

1396 It is insisted by carriers generally that it is necessary, in order to prevent discrimination, that charges for refrigeration should be a stated sum in cents per 100 pounds of freight transported. That is to say, that carriers as a rule in this proceeding advocate that refrigeration charges should be a stated sum in cents per 100 pounds of freight hauled in each car, based on the carload minimum; and that for less-than-carload shipments there should be a stated sum for the entire service in cents per 100 pounds for the tonnage hauled, with a minimum charge per shipment which should be the equivalent of the less-than-carload charge for 100 pounds.

The railroad-owned car lines are of the opinion that the refrigeration charge should be either based on the freight transported or on a per car basis.

The Louisville & Nashville Railroad Company desires to continue its charge based on the amount of ice furnished, even though it results in performing the service at cost or less, on the theory that by so doing it may encourage the growth and production of perishable products on or adjacent to its lines.

Carriers give as their reasons for desiring that refrigeration charges be based on the tonnage of freight hauled the following: (1) Carriers can not be expected or required to sell ice as a commodity, they are required to furnish refrigeration service; (2) a stated charge places unlimited responsibility on the carrier, with freedom to give adequate and efficient refrigeration in transit without restrictions from shippers; (3) the stated charge promotes the conservation of food products by preventing waste; (4) it insures parity of rates and equality between shippers and shipments; (5) a charge based only on the cost of labor and ice and salt does not give the carrier compensation for the various other factors which form legitimate parts of the gross cost of furnishing refrigeration; and (6) a stated charge is known in advance, and is of convenience to the shipper in enabling him to quote prices f. o. b. destination.

It is stated of record that there are now no stated refrigeration charges published based on the weight of the freight hauled. There are charges now in effect based on the package and distance of the haul. The commission has approved stated charges on a per car basis in transcontinental service. Arlington Heights Fruit Exchange v. S. P., 20 I. C. C. 106; R. R. Com. of Cal. v. A. G. & S. R.

R. Co., 32 I. C. C. 17; Westbound Transcontinental Refrigeration Charges, 34 I. C. C. 140.

Shippers were of opinion that it would not be possible to fix refrigeration charges with reference to the lading of the car, without discrimination; that such charges would require a shipper to pay for maximum refrigeration in a car furnished by a car-
1397 rier twice as much in the case of a 60,000-pound load as for 30,000-pound load; and that the charges would vary with each load shipped, although the service rendered by the carrier, so far as the refrigeration is concerned, would be the same with respect to each load.

A representative of the Refrigerator Car Lines Committee of the National League of Commission Merchants of the United States, interested in fruit and vegetable shipments, testified that refrigeration charges for short and medium hauls have always been based on the amount of the ice furnished, where the carrier renders the service. It is contended that this is a simple and direct method of charging the shipper for what he receives, and remunerating the carrier for what it furnishes. It is further insisted that no workable or equitable plan for applying refrigeration charges on the basis of the freight hauled could be devised that would fit the varying conditions of transportation of perishable commodities for short or medium distances. Among the conditions named are changing temperatures, different costs of ice, nature of the shipments, and the various differences in hauls. It is insisted that the present rules maintained by carriers with respect to comparatively short hauls, by which the weight of the ice and when and where it is furnished, all appear on the freight bills, is more satisfactory than the payment of a stated charge, which includes no information as to the amount of ice used by the carrier or where it is placed in the bunkers.

Shippers of fresh meats and packing-house products insist that it would not be just, economical, or in the public interest that stated charges for refrigeration of such products should be established and maintained by the carriers of the country. It is asserted by them that most of the services performed by carriers included in stated charges approved by the commission and applied to their commodities, are performed by shippers of fresh meats and packing-house products, and that certain other elements of cost which might properly be included in stated charges, if they were to be established de novo, have already been included in the freight rates. It is conceded by Swift & Company on brief that the carrier is entitled to a fair charge for ice furnished, such charge to include all items of labor, interest, etc., on the investment in the icing plant; and that if the present charges are not sufficient to include the cost of ice and the labor of putting it in the bunkers, the cost of salt, and other items of cost, the carrier is entitled to a higher charge.

It is further asserted that in most instances where stated refrigeration charges now exist the carrier furnishes the car; that with respect to shipments of fresh meats and packing-house

products the shipper is required to furnish the car; that where stated charges prevail the carrier precools the car; that in
1398 shipments of fresh meat and packing-house products the shipper precools the car and it would be impracticable for the carrier to perform such a service; that where stated refrigeration charges are imposed the carrier performs the initial icing; that in shipments of fresh meats and packing-house products the shipper performs the initial icing, and it would not be practicable for the carrier to do so; that under stated refrigeration charges the cost of repairs to ice bunkers and the cars are borne by the carriers; that with respect to shipments of fresh meats and packing-house products all repairs are borne by the shipper and owner of the car; that in cases where stated refrigeration charges have been approved by the commission allowance was made for the cost of hauling the ice; and that such cost has been included in the freight rates on fresh meats and packing-house products.

It is contended that none of the elements ordinarily considered as going to make up a stated refrigeration charge, except the cost of ice and salt, and the labor of putting it in the bunkers, is proper to be charged against shipments of fresh meats and packing-house products.

It is argued by shippers that haulage of the ice, cost of supervision and repairs to bunkers and cars, and cost of extra switching were taken into account in fixing rates on fresh meats and packing-house products. For example, it is stated on brief that extra switching is an item for which the commission allowed $1.75 per car in passing on the reasonableness of stated refrigeration charges in transcontinental service. Arlington Heights Fruit Exchange and Railroad Commission of California cases, supra. It is insisted that this is an item already included in the freight rate on fresh meats and packing-house products moving under cost of ice and salt reicing charges; that by reference to the testimony and exhibits of the commission's records in the Eastern Live Stock case, 36 I. C. C. 675, and Central Freight Association Territory Fresh Meat and Packing House Product Rates, 38 I. C. C. 665, it will be found that switching to ice houses and weight of ice transported were elements upon which evidence was introduced by the carriers in support of increased rates and which were considered by the commission. In the first case the commission approved a rate of 47.5 cents per 100 pounds from Chicago to New York, as proposed by the carriers. Attention is also called to the fact that the rate then approved has been increased to 55 cents by order of the commission dated March 12, 1918, in which was vacated the suspension of certain proposed increased rates in Investigation and Suspension Docket No. 1124, Eastern Live Stock Fresh Meat case.

1399 These shippers further contend that refrigeration charges should be determined from a practical and economical stand-

point, the nature of the product, the conditions under and the seasons in which it moves, the character and amount of refrigeration required, and the most economical way of furnishing it from the standpoint of the carrier, shipper and public. It is asserted that where carriers are called upon to furnish refrigeration, as in the case of fruit, berries, and vegetables from scattered stations and for short periods of time during the warm months when maximum refrigeration is required, a stated charge for the entire service is proper and just; and that where it is necessary for a shipper to precool and reice at his plant year-round shipments from cold-storage plants, such as fresh meats and packing house products and dairy products, and where, both from a practical and economical standpoint, such precooling and reicing should be borne by the shipper, the charge for reicing at various stations en route should be based upon the cost of ice and salt furnished. It is further insisted that in regard to fresh meat, packing house and dairy products, the character of refrigeration required varies with different seasons of the year, the conditions under which they are shipped, and the nature of the commodities. Cheese, eggs, butter, and the less perishable packing house products, during about one-half the year, require no icing en route. The maximum refrigeration with respect to these commodities is only required in the warmest months of the year. It is contended that if a stated charge per car or per 100 pounds is established by carriers, it would necessarily be fixed high enough to cover maximum refrigeration which would burden the traffic with charges for service not performed or required.

Attention is called to the fact that stated refrigeration charges were first established for transcontinental shipments which move great distances through varying temperatures and changing conditions. It is insisted that stated charges for refrigeration of fruits and vegetables are proper because the entire service is performed by the carrier or agent from origin to destination; that such shipments are not precooled as a rule, and the service is an entire service, including the furnishing of the car, initially icing it and reicing it en route; and that the service from beginning to end is a carrier service for all items of which payment should be made. In shipments of fresh meat and packing-house and dairy products, shipments are made from cooling stations, and the initial icing and reicing is done by the shipper. A few years ago dairy products were shipped without precooling, but at this time and during recent years the commodities are precooled before being loaded into cars at central stations or concentrating points erected for the purpose and
1400 maintained at the expense of the shipper. National Poultry, Butter & Egg Asso. v. B. & O. S. W. R. R. Co., 44 I. C. C. 392, 399.

Under the present practice at packing plants, empty cars are delivered in receiving yards. They are there thoroughly inspected and washed out and, if necessary, disinfected by a force of men em-

ployed for the purpose. If cars are found to be in good order, and they are clean, they are switched to the icing sheds usually the evening before loading. The bunkers are filled with crushed ice and salt. The next morning they are switched to loading platforms and loaded with fresh meat or other articles. After loading, the bunkers are again filled with ice and the cars are ordered forward. It is insisted that icing facilities of carriers at packing centers are limited and at some distance from the loading platforms of shippers, and that there would be a waste of time and ice should carriers undertake initial icing and reicing of fresh meats and packing-house products. It is further stated that at this time carriers could not secure facilities adjacent to plants of meat packers without enormous expenditures of money; and that if such facilities were secured the work could not be so economically or efficiently done as now. Some of the carriers recognize this situation and assert that the service might be provided for in a stated charge, and an allowance paid to the shipper for precooling and initial icing. Because of the varying degrees of initial preparation of cars for loading of various products at packing plants, during different seasons of the year, it is doubtful if any allowance could be agreed upon or prescribed that would be just and reasonable in all cases.

It is to be remembered that with respect to shipments of fresh meat and packing-house products, charges in all that part of the country east of the transcontinental zone are based on the weight of the ice or ice and salt furnished. The service rendered by carriers with respect to fresh meat and packing-house products and dairy products is reicing, and not refrigeration in all that the latter service implied. The plants of carriers about the country are reicing and not precooling or refrigeration plants. Some car lines, such as the American Refrigerator Transit Company, have cooling stations where commodities may be stored, but they are for the use of the company to protect shipments en route, or the articles are kept under refrigeration at a charge to the shipper pending disposition. There is no doubt that shippers of fresh meat and packing-house and dairy products are in position to best prepare cars for initial icing and reicing before they are tendered to the carrier for transportation. Needs in this respect as to different articles are peculiarly within shippers' knowledge, and under the practice that has obtained for more than 30 years, they have fitted their plants to do the work effectively and economically.

1401 The statute contemplates that carriers may ice in transit as well as perform the entire refrigeration service. The language of the act is that transportation shall include "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." In speaking of precooled shipments and the preparation of cars for shipment in Arlington Heights Fruit Exchange Case, supra, at page 118, the commission said:

"This service should be performed in the most economical manner and it is evident that the ice can best be supplied by the same parties

who load the car and prepare it for shipment. The filling of the bunkers with ice is a part of the preparation of the car for shipment and not a part of the transportation service rendered by the railroads."

There are some practices connected with reicing service now performed by carriers with respect to shipments of fresh meat, packing house and dairy products, that should be changed. The larger meat packers are engaged to a considerable extent in shipping dairy products as well as products of their meat-packing plants. As heretofore explained, considerable reicing service in official classification territory through which shipments pass on their way from west to east and southeast, is performed for the railroad either directly by the packers or by corporations they control. Whenever transportation service of this character is farmed out by the carrier to a shipper, who renders the service with respect to his own shipments, as well as those of competitors, there may be and there quite likely are unlawful results. A meat packer located on the Missouri River, and by no means an insignificant concern, measured by the volume of its shipments, complains vigorously that reicing performed by a competitor at an interior point in official classification territory is not satisfactory, and that its competitor has access to the billing and is advised of the character of the shipments and to whom they are made, contrary to the provisions of section 15 of the act. The evidence is not clear as to particular instances of improper icing, but there can be no doubt that access to the billing of a shipper by another and a competitor is unlawful. If the shipper who renders the service makes a profit therefrom, there at once arises the question whether such profit does not amount to a concession to him from the rates he pays on his own traffic.

Aside from these considerations there is dissatisfaction and unrest amongst competing shippers when disputes as to the amount and character of icing is referred to one of them who rendered the service. This situation obtains when the icing is done by a corporation controlled by a competitor as well as when it is done directly by the competitor. Of course, there can be no valid objection to
1402 carriers doing by an agent what they may do themselves, where such agent is not a shipper or otherwise interested in transportation of the articles with respect to which the service is rendered.

This record does not contain evidence sufficient to determine what would be a reasonable charge for service of reicing fresh meats, packing house, and dairy products, but it does indicate that it is now being performed by carriers at less than cost. Charges for the service should be upon a just basis considering the costs proper to be included such as salt, ice, labor, etc., together with a reasonable profit.

Demurrage on private cars

Under the existing tariffs of carriers private cars are made the subject of demurrage when standing on private tracks of owners. It is agreed by both carriers and owners that tariffs should be so

worded as to exempt a private car from demurrage under such circumstances. It was stated that provision would have been made some time ago for such exemption except for the difficulty of determining who was the owner of a car. It was agreed that a shipper who leases a car for a term is to be considered the owner during such term, and that a stencil mark on the car as defined in tariffs should be conclusive as to ownership for purposes of exemption from demurrage.

Some private car owners insist that they are entitled to a part of the demurrage accruing on private cars held by consignees. This is not the attitude of owners generally. Demurrage is a penalty for detention of cars, and is enforced in accordance with tariff provisions to keep them moving. This is as important to private car owners as to the railroads and everyone else. The records of car placement, etc., are kept by the carriers, and they make the collection in the interest of the entire shipping public, and the charges are rightfully retained by them.

Master Car Builders' Association rules

The Master Car Builders' Association is an organization of car owners, both private and railroad. The association first met in 1864, when a number of men connected with car departments of railroads came together to discuss problems that had arisen in freight-car construction. It was organized in 1867, when the first regular meeting was held and by-laws were adopted. The organization did not become an effective agency in car construction and repairs until 1887, when the first book of interchange rules was adopted and published. The purposes of the organization are (1) for increase of knowledge on the part of members relative to freight-car construction and maintenance; (2) to promote uniformity in freight-car construction and interchangeability of detail; (3) to improve freight-car construction in reference to safety and other details; and (4) to develop rules to adjust mutually the differences of railroads or members of the association in connection with freight-car maintenance and interchange.

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The by-laws provide that a member of the association shall be entitled to one vote for each 1,000 freight cars owned. The affairs of the association are controlled by an executive committee elected by the members. Various standing committees are appointed by the executive committee to consider and report to the executive committee or the association at its annual meeting on the different questions that are presented to them. For example, there is an arbitration committee the business of which is to adjust disputes that may arise under the rules.

A code of rules governing the condition of and repairs to freight cars for the interchange of traffic is printed and circulated from time to time as occasion requires, or when material changes in the rules

are made. Rules are provided for the care of freight cars off the line of the owning carrier, for interchange of such cars, with specifications as to construction of cars and parts. In short, the rules go into detail with respect to every phase of construction and repairs, giving prices to be charged for parts used in repairs, and prescribing how bills shall be made and rendered to owning carriers.

Many owners of private cars conduct their own repair shops, where major repairs are made. For running repairs owners have to rely on the repair shops of railroads.

During the hearing private car owners made complaints which were chiefly directed to the fact that carriers did not render bills for repairs promptly; that evidence as to improper repairs or repairs that had been charged for but not made was not permitted to overcome the statement of the repairing carrier; that cards formerly attached to cars showing repairs made at the time were not now sent with the cars; and that private car owners did not have representation on the executive or arbitration committees.

There is no serious complaint as to the rules regarding the making of and charges for repairs. The general disposition of car owners was to conform to the rules if they are faithfully observed. Some private car owners desire that the commission require carriers to publish the rules in their tariffs and have them observed accordingly. Aside from the question of jurisdiction of the commission over operations of carriers in this respect, carriers object to such filing on the ground that the effect would be to set the rules as they now
1404 are so that necessary changes could not be promptly made. Application to the commission for permission to make changes which might be required would delay operation and complicate a system which as a whole has operated satisfactorily. Many private car owners were not in favor of the publication of the rules in tariffs.

A representative of the Master Car Builders Association stated at the hearing that there appeared to be no objection to returning to the practice of attaching repair cards at the time the repairs are made to the cars of private owners, provided that the bill was not nullified if the card was lost or destroyed. To this, car owners agreed, and it is suggested by them that there be attached to their cars a steel pocket or other receptacle in which the repair card might be placed. The representative of the association also stated that there is no good reason why representatives of private car owners should not be on all committees of the association, including the executive and arbitration committees. He further stated that every effort would be made to induce carriers to render repair bills more promptly, and that disputes as to improper repairs or repairs charged for but not made would and should be decided by the arbitration committee under the facts of each case presented and in accordance with the weight of the evidence.

These suggestions were approved by the private car owners, and if adopted many troublesome and harassing disputes as to bills for car repairs will be at an end.

Mixing and follow lot rules

The rules governing mixtures of shipments and follow lots now in effect in different sections of the country are not uniform. These rules should not be different when the traffic is transported in privately owned than in railroad-owned cars. Considerable testimony in this regard is devoted to a discussion of the mixing rules in official classification territory applicable to shipments of the meat packers. Practically all shipments by the packers are made in their own cars or in those of their subsidiaries. Because of this the rules specially applicable to them were made an issue in this proceeding.

In addition to rule 10 in the official classification, which is the general mixing rule, carriers in the territory governed thereby have, by exceptions to the classification, published three separate rules applicable to articles shipped by the packers. Under these rules different combinations may be made of fresh meat and packing-house products, or of packing-house products, so that different rates per car or per article may be paid for the transportation. It is perfectly clear that the maintenance of so many rules applicable to
1405 shipments from one source complicates the billing and renders it a matter of no little difficulty to determine the charges to be applied to the different articles in each mixture. It is not plainly established of record whether the mixing rules in this territory operate to discriminate unduly against any particular shipper or shippers or any particular description of traffic. It was suggested on the record that such discrimination is possible under the rules.

Mixing rules in the other classification territories are different in many material respects from those in official classification territory as applicable to the same articles. The same thing is to be said with respect to follow-lot rules. It is not necessary, however, to consider these rules further in this proceeding, or to suggest what action should be taken with respect to them, for the reason that the matter is now having consideration of a special committee of experts with a view to suggesting and having adopted by carriers rules as to mixed shipments and follow lots, among other things, that shall be clear, direct, and applicable throughout the entire country.

When this case was originally heard, meat pans and other appliances used by the packers for the transportation of packing-house products or other products shipped with carcass meat were returned to the point of origin without charge. Charges are now made for such shipments under proper tariff provision. Hooks for the carriage of carcass meat are returned free when properly packed and sent over the line of the transporting carrier.

Shipments over the Atlantic Coast Line

When this case was first heard in 1913, shippers of fish, fruit, vegetables, and berries submitted considerable evidence with respect to the condition of cars furnished and the movement of them from

points on the Atlantic Coast Line in Florida, Georgia, and North Carolina to northern points. More and better cars and reasonably acceptable service were furnished after the original hearing, and at subsequent hearings no complaint of the service was made. It is assumed that the complaint has been satisfied. At the time of this complaint the cars were furnished by Armour Car Lines under contract with the carrier. At the present time a similar contract is being carried out by the Fruit Growers Express. A carrier may make such a contract, but it can not thereby absolve itself from the obligation to furnish suitable cars operated under reasonable schedules to serve the needs of its shippers.

Minimum weights

Little evidence was submitted with respect to minimum weights on shipments of perishable freight transported in private cars. There is no basis for a finding with respect to this matter. In addition to this minimum weights are inextricably involved in mixing rules, and will doubtless be considered by the committee above referred to.

Conclusions

Under all the facts and circumstances shown of record, we find:

1. That as the situation now exists, and under the circumstances and conditions shown of record, shippers may continue to lease cars to transport their shipments from sources independent of carriers by railroad.

2. That a charge in addition to freight rates should not be made for furnishing to shippers refrigerator, tank, or other special type of car, or for transporting their shipments therein, unless the freight rates are predicated on the transportation in another type of car less expensive and not so difficult to operate.

3. That payments should be made by carriers on the basis of the loaded and empty mileage, and that mileage should be computed on the basis of distance tables without the elimination of mileage through switching districts.

4. That there should be no increase in the present payment for use of refrigerator cars and so-called meat cars for transportation in that part of the country east of El Paso, Tex., Albuquerque, N. Mex., and Salt Lake City and Ogden, Utah.

5. That the present payment of ¾ cent on the loaded and empty movements for the use of tank cars of all kinds by all carriers by railroad should be increased to 1 cent per mile for the loaded and empty movements; that the increased allowance should be paid for the use of live poultry cars, palace stock cars, heater cars, and that under the facts here shown the increase should not apply to stock cars, coke cars, coal cars, rack cars, flat cars, box cars, or pocket cars, although they may be privately owned or leased.

6. That carriers should publish in their tariffs a rule that private cars when unloaded at destination, unless otherwise ordered by the owner or lessee, must be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee.

7. That where carriers own tank cars which are furnished to shippers on request, they shall publish in their tariffs rules for the distribution thereof whereby each shipper who makes reasonable request may receive his proportionate share of available cars.

8. That re-icing charges on shipments of fresh meat and packing-house products and dairy products should be based on the cost of the ice and salt used, the labor, investment in icing plants, etc., together with a reasonable profit; that the carriers only should perform the service of reicing and make charges therefor; and that shippers
1407 of these products should not be permitted to perform the service of reicing their own and competitors' shipments en route, either directly or through corporations controlled by them.

9. That tariffs of carriers be so changed that private cars standing on the private tracks of owners shall not be subject to demurrage charges.

10. That the Master Car Builders Association rules be not filed in tariffs of carriers; and that suggestions made at the hearing as to modifications in rules and practices be adopted by the association.

With respect to the proposed changes in Master Car Builders Association rules as agreed to and proposed at the hearing it is assumed they will be promptly acted upon. It is also assumed that carriers will no longer permit the packers or others by themselves, or through corporations controlled by them, to re-ice their own shipments and those of their competitors en route, and that the carriers will proceed promptly to equip themselves with proper icing stations to perform the service enjoined upon them by law. It is further assumed that proper tariff rules will be promptly published with respect to distribution of tank cars owned by carriers. A rule should also be incorporated in tariffs of carriers at an early date to the effect that private cars when unloaded at destination, unless otherwise ordered by the owner or lessee, must be promptly transported, loaded or empty, in the direction of the plant of the owner or lessee. As there was no objection to the computation of mileage on distance tables that shall show the mileage of private cars based on the total haul, with the exception alone of switching movement, it is assumed arrangements will be made by carriers accordingly.

With respect to the other conclusions and findings an appropriate order will issue.

APPENDIX

TABLE 1.—*Mileage received by representative refrigerator, tank, and other private-car owners for the year 1912, together with a comparison of the total of repairs and depreciation computed at 5 per cent on the investment in cars, with the mileage earnings for that year*

	Cars	Investment in cars	Mileage earnings	Repairs	Depreciation	Repairs and depreciation	Repairs and depreciation [illegible] mileage earnings [illegible]
Armour Palace Horse Car Co	441	$734,650	$55,104	$46,577	$37,433	$84,010	$41,28[illegible]
Chicago, New York & Boston Refrigerator Co	941	700,000	132,047	37,628	37,345	75,378	54,67[illegible]
Dunn Stock Car Co	1,358	941,000	93,034	74,090	77,261	151,341	9,31[illegible]
German-American Car Co	1,020	1,100,700	79,670	59,339	55,035	94,354	5,68[illegible]
Lenroc Carriers Co	200	259,004	19,732	16,314	16,000	26,314	7,41[illegible]
Mather Horse & Stock Car Co	10,901	9,003,573	127,211	460,415	483,194	843,930	*710,[illegible]
Streets Western Stable Car Line	7,229	4,134,256	532,698	338,615	209,712	548,167	212,47[illegible]
Union Tank Line Co	11,991	12,919,695	797,909	892,569	945,926	1,313,512	517,60[illegible]
Western Heater Dispatch	340	367,500	37,191	13,659	20,179	33,317	15,87[illegible]
American Refrigerator Transit Co	2,784	3,171,723	427,900	279,474	158,290	439,(illegible)	10,09[illegible]
Armour Car Lines	13,209	11,878,807	2,265,292	1,005,144	560,930	1,617,094	650,87[illegible]
Swift Refrigerator Transit Co	7,021	9,359,317	1,540,194	911,273	627,069	1,538,219	102,97[illegible]
Cudahy Packing Co	1,318	1,716,400	423,000	217,000	85,929	302,917	120,0[illegible]
Morris & Co	2,611	2,309,131	670,340	187,316	115,630	213,982	103,91[illegible]
St. Louis Independent Packing Co	150	195,300	55,217	11,015	9,356	21,473	15,74[illegible]
Texas Co	1,143	1,045,201	79,250	56,653	63,263	102,190	22,94[illegible]
Southern Cottonoil Co	438	504,170	35,013	21,429	16,209	39,637	17,62[illegible]
Crystal Car Line	196	228,259	16,963	5,704	11,453	17,157	6,19[illegible]

* Figures in italics show excess of earnings.

[illegible] Rental, $942,262

TABLE 2.—*Mileage received by representative refrigerator, tank, and other private-car owners for each year from Jan. 1, 1913, to Jan. 1, 1918, inclusive, together with a comparison of the total of repairs and depreciation computed at 5 per cent on the investment in cars, with the mileage earnings for each year*

	Cars	Investment in cars	Mileage earnings	Repairs	Depreciation	Repairs and depreciation	Repairs and depreciation [illegible] mileage earnings [illegible]
Armour Palace Horse Car Co.*							
1913	439	$475,750	$36,255	$32,291	$45,930	[illegible],221	$64,[illegible]
1914	397	663,231	60,513	40,656	47,103	87,917	61,[illegible]
1915	439	708,201	94,013	54,439	39,938	94,340	40,[illegible]
1917	449	695,901	44,950	50,314	34,695	85,009	30,[illegible]
Chicago, New York & Boston Refrigerator Co.							
1913	941	724,130	134,956	38,194	37,336	66,740	59,[illegible]
1914	939	746,014	120,902	74,034	37,301	91,335	5[illegible],[illegible]67
1915	941	700,139	134,720	37,963	35,938	134,[illegible]	146
1916	700	726,173	134,033	73,963	38,439	111,127	22,[illegible]93
1917	784	730,307	126,872	90,994	36,019	135,013	8,[illegible]40
Dunn Stock Car Co.							
1913	1,167	946,013	93,167	70,467	68,001	138,469	47,[illegible]33
1914	1,439	791,253	85,139	103,[illegible]	38,[illegible]	142,[illegible]	[illegible],[illegible]34
1915	1,352	790,679	93,367	113,613	38,344	151,959	111,[illegible]92
1916	1,214	737,105	77,344	96,109	38,479	137,[illegible]	51,[illegible]78
1917	1,000	580,037	64,963	90,[illegible]	34,[illegible]	124,410	59,[illegible]27

* Figures in italics show excess of earnings.

[illegible] Data not available for 1913.

TABLE 2.—*Mileage received by representative refrigerator, tank, and other private-car owners for each year from Jan. 1, 1913, to Jan. 1, 1918, etc.*—Continued.

	Cars	Investment in cars	Mileage earnings	Repairs	Depreciation	Repairs and depreciation	Repairs and depreciation exceed Mileage earnings
German-American Car Co., now the General American Tank Car Corporation.							
1913	1,497	$1,270,389	$124,700	$81,278	$63,830	$145,108	$20,408
1914	1,833	1,563,053	139,520	160,722	78,150	180,872	24,349
1915	2,661	2,292,933	199,994	111,256	114,047	225,303	25,309
1916	3,498	4,360,250	251,460	136,000	229,317	365,407	113,944
1917	4,331	6,091,429	284,330	129,864	306,071	435,935	149,605
Lehigh Carfrel Co.							
1913	178	214,855	18,347	15,761	10,743	26,504	13,157
1914	156	188,241	7,819	21,229	9,412	30,641	22,822
1915	156	188,241	8,339	7,296	9,412	16,672	8,334
1916	129	155,578	6,256	15,287	7,779	23,066	16,810
1917	200	241,440	17,736	21,261	12,073	33,334	15,610
Mather Horse & Stock Car Co.							
1913	10,399	7,843,440	111,167	660,694	392,172	1,052,776	941,609
1914	10,021	7,558,339	75,696	750,606	277,917	1,107,973	1,032,277
1915	10,212	7,628,858	78,362	821,265	391,441	912,706	834,344
1916	9,762	7,359,770	40,781	636,472	376,989	1,016,471	975,690
1917	9,261	7,188,683	11,443	828,261	358,452	1,186,713	1,175,269
Street Western Stable Car Line, now the Streeto Co.							
1913	6,700	3,926,911	287,049	312,027	199,344	509,953	241,907
1914	6,486	3,809,149	180,801	345,268	193,477	538,745	357,874
1915	5,436	3,261,379	144,105	309,803	163,039	501,872	388,107
1916	4,972	3,023,355	185,729	340,404	151,167	413,631	3 8,302
1917	3,661	2,249,150	4 74,000	364,703	112,408	477,173	403,111
Union Tank Line Co.							
1913	12,411	13,980,954	1,991,178	716,030	680,899	1,436,529	414,649
1914	12,380	14,011,308	762,827	693,760	708,305	1,394,445	631,518
1915	14,338	15,631,558	942,819	716,617	782,578	1,499,215	536,396
1916	16,079	18,365,132	1,448,740	971,960	918,257	1,790,217	340,476
1917	19,066	23,629,377	1,661,557	896,471	1,182,219	2,078,690	427,133
Western Heater Dispatch							
1913							
1914, 4 months	300	300,065	26,773	4 25,779	6,134	31,928	5,149
1915	279	269,189	43,271	4 62,891	18,410	81,100	37,829
1916	279	269,196	37,459	4 22,892	18,410	41,212	3,754
1917	279	269,190	19,780	4 62,654	18,410	81,064	64,284
American Refrigerating Transit Co.							
1913	3,148	3,380,579	516,863	298,678	168,479	455,555	41,308
1914	3,201	3,068,821	749,333	305,903	208,447	605,263	61,930
1915	3,201	3,067,237	941,273	303,318	208,962	662,199	119,083
1916	3,212	3,080,779	915,652	407,204	299,039	705,263	110,389
1917	3,457	4,185,063	948,263	565,191	309,759	974,144	25,880
Armour & Co., car depart ment *							
1916	4,551	5,305,869	1,109,439	363,748	169,080	733,479	374,040
1917	4,560	4,173,774	1,090,462	620,649	208,780	829,427	370,039
Swift Refrigerating Transporta tion Co.							
1913	7,252	8,555,866	1,426,119	1,120,227	627,784	1,747,931	142,913
1914	6,721	8,186,170	1,205,636	909,263	639,306	1,548,569	53,039
1915	6,780	8,307,579	1,408,379	973,971	626,879	1,402,849	7,530
1916	6,625	8,617,319	1,380,089	1,070,961	632,866	1,703,827	113,738
1917	7,119	10,189,512	1,351,153	1,277,491	807,477	2,085,188	433,995
Cudahy Packing Co.							
1913	1,500	1,513,920	455,674	4 162,250	72,081	240,974	212,700
1914	1,502	1,471,008	640,992	134,084	73,302	207,647	233,345
1915	1,498	1,509,979	512,605	119,040	79,449	198,488	313,887
1916	1,478	1,505,004	605,543	96,728	69,655	166,379	560,164
1917	1,454	1,495,013	409,504	103,429	74,101	177,530	659,001
Morris & Co.							
1913	2,399	2,296,600	408,307	260,296	114,547	374,843	175,464
1914	2,370	2,167,423	503,748	294,307	108,871	402,58	107,780
1915	2,355	2,160,430	601,524	280,313	126,872	418,20	185,580
1916	2,360	2,053,860	600,000	258,200	132,700	420,00	174,190
1917	2,721	3,399,700	626,227	304,050	109,468	553,598	97,719

* Rental in lieu of mileage $407,000.
† Includes repairs on 147 box cars.
‡ Data not available for 1913, 1914, and 1915.
§ Only repair supplies are shown.

TABLE 2.—*Mileage received by representative refrigerator, tank, and other private-car owners for each year from Jan. 1, 1913, to Jan. 1, 1918, etc.*—Continued

	Cars	Investment in cars	Mileage earnings	Repairs	Depreciation	Repairs and depreciation	Repairs and depreciation allowed mileage earnings
St. Louis Refrigerator Packing Co.							
1913	131	$191,604	$31,735	$11,960	$9,702	$21,140	$10,594
1914	131	191,604	32,359	19,813	9,783	29,596	3,237
1915	131	191,604	29,135	17,371	9,783	27,154	2,019
1916	131	191,604	30,125	19,642	9,783	29,425	695
1917	131	191,604	32,666	28,179	9,783	37,962	5,296
Texas Co. *							
1913	1,479	1,654,220	119,072	40,397	82,710	123,113	4,041
1914	1,458	1,644,067	146,361	64,231	82,253	146,484	23,877
1917	1,623	2,020,301	189,214	60,048	101,015	161,063	11,849
Southern Cotton Oil Co.							
1913	425	475,370	34,001	30,975	21,299	41,283	17,282
1914	454	507,959	35,994	35,310	20,290	41,600	21,794
1915	425	475,370	33,471	70,993	20,290	90,283	64,812
1916	419	468,996	36,053	41,990	20,074	61,979	25,926
1917	396	460,470	34,944	68,120	20,074	88,660	53,716
Crystal Car Line							
1913	186	214,000	9,712	6,160	10,900	17,060	7,348
1914	194	228,830	9,211	8,673	11,941	19,714	10,503
1915	259	276,330	19,104	6,000	12,900	19,653	1,549
1916	259	276,330	19,117	10,947	12,900	23,847	4,194
1917	259	276,330	17,394	10,458	12,900	23,358	5,964

* Data not available for 1913 and 1914.

CLASS A.—INDIVIDUALS, COMPANIES, AND CORPORATIONS OPERATING CARS NOT OWNED OR CONTROLLED BY RAILROADS OR SHIPPERS (INDEPENDENTS)

Names of individuals, companies, and corporations operating cars	Cars operated: Kind	Cars operated: Number	Cars operated: Average cost per car	Cars reported	Cars used chiefly for—	Per car per year: Average earnings from all sources [1]	Per car per year: Average miles run	Per car per year: Average mileage earnings	Per car per day: Average miles run	Per car per day: Average mileage earnings
Arms Palace Horse Car Company (palace stock cars):	Passenger service		$3,447	5	Thoroughbred stock	$1,018.53		[2] 875.92		
Do					do	297.31		[2] 75.92		
Do	Freight service	441	1,271	5	do	298.71		[2] 75.92		
Do	do		1,147	5	do	337.70		[2] 75.92		
Do	Freight and passenger service		2,300	5	do	321.19		[2] 75.92		
Atlantic Seaboard Dispatch	do		1,871	5	do					
Chicago New York & Boston Refrig Co	Refrigerator	612		612	Dairy products	139.84	15,867	139.84	43	$0.38
Chicago Refrigerator Despatch Co	do	870	886	870	do	247.83	18,526	150.88	51	.41
Do	do	312	1,300	25	do	157.60	16,100	131.97	44	.36
Crawford James R	do		924	27	Packing house products	141.59	18,224	141.59	50	.388
Dairy shippers' Despatch	do	4	600	4	Dairy products	81.39	8,683	81.39	24	.223
Do	do	269	1,059	27	do	[3] 163.63	21,041	163.25	58	.447
Eastman Car Company	Heater	425	1,059	266	do	485.55	24,280	205.54	67	.563
German American Car Company	Tank		800	425	Potatoes	297.10	8,010	62.20	22	.17
Do	do	1,072	1,200	23	Sulphuric acid	300.00	15,894	119.21	44	.33
International Transit Co	do		1,100	13	Petroleum and products	240.00	9,145	68.58	25	.19
Klein Tank Line	do	20	1,271	20	Molasses	225.87	8,879	66.60	24	.18
Lemay Carriers Co	do	46	1,100	46	do	153.98	8,915	68.27	24	.19
Live Poultry Transportation Co	Live poultry	300	1,200	25	Live poultry	363.38	13,628	102.14	37	.28
Missouri River Despatch	do	693	1,749	25	do	424.40	16,700	125.73	45	.34
Shippers Refrigerating Car Co	Refrigerator	446	900	446	Packing house and dairy products	179.12	18,861	139.94	52	.44
Solar Transportation Co	do	2.7	900	277	Dairy products	169.91	14,708	122.00	40	.33
Union Tank Line Co	do	22	240	20	Packing house products	155.28	20,221	153.28	55	.42
Do	Tank—600 service			25	Petroleum and products	237.93	8,113	60.85	22	.17
Do	Tank—1,000 service	11,881	1,067	25	do	211.55	5,804	53.53	16	.12
	Tank—13,000 service			25	do	273.75	8,828	66.21	24	.18
Western Heater Dispatch	Refrigerator, beer-car type	546	1,054	25	Potatoes	124.75	7,253	58.87	20	.16
Western Live Stock Express	Double-deck stock	973	866	24	Beer	199.96	18,000	163.12	50	.45
					Hogs, sheep, calves	125.05	20,425	125.05	66	.34

[1] The total earnings of private cars include such items as mileage, per diem in lieu of mileage, rental of cars, commissions for soliciting and handling freight, shipments, refrigeration and heating service, and other miscellaneous earnings.

[2] Figures shown represent average mileage earnings of all cars operated.

[3] Commission earnings not given.

[4] New cars, in service only a few months.

1412-1413 TABLE 3.—*Statement showing the performance of private cars of different kinds as operated by different classes of car owners or operators compiled from reports submitted by private car owners*—Continued.

CLASS B—INCORPORATED CAR LINES OPERATING CARS OWNED OR CONTROLLED BY RAILROAD COMPANIES

Name of individuals, companies, and corporations operating cars	Cars operated		Average cost per car	Cars reported on	Cars used chiefly for—	Per car per year			Per car per day	
	Kind	Number				Average earnings from all sources	Average miles run	Average mileage earnings	Average miles run	Average mileage earnings
American Refrigerator Transit Co	Refrigerator	3,283	$1,000	3,283	Fruit, vegetables	$271.51	16,122	$131.93	39	$0.26
Central Fruit Despatch	do	3,666	717	3,666	do	174.96	18,300	158.44	51	.434
Pacific Fruit Express	do	9,982	1,541	23	do	547.42	24,805	202.20	68	.56
Santa Fe Refrigerator Despatch Co	do	7,474	1,053	7,474	do	300.70	22,190	165.30	61	.45

CLASS C—INCORPORATED CAR LINES OPERATING CARS OWNED OR CONTROLLED BY SHIPPERS, CARS USED CHIEFLY FOR TRANSPORTING FREIGHT IN WHICH CONTROLLING COMPANIES ARE INTERESTED

Armour Car Lines	Refrigerator	15,296	$1,243	25	Fruit, vegetables	$149.26	17,568	$148.05	41	$0.49
Do	do		717	25	Meats, packing-house products	282.67	27,504	233.67	75	.64
Do	do		800	25	Brewery products	170.40	20,055	None	63	
Do	Tank		970	25	Oil, grease, molasses	119.00	13,981	104.63	38	.285
Chicago Stock Express	Double-deck stock	50	849	25	Hogs, sheep, calves	178.29	29,713	178.29	81	.49
Cold Blast Transportation Co	Tank	1,504	500	25	Oils, tallow	75.44	10,509	75.44	29	.21
Do	Refrigerator		1,063	25	Meats, packing-house products	212.27	25,575	212.27	70	.58
Crystal Car Line	Tank	100	1,140	25	Glucose, corn, oil, syrup, etc	314.15	9,880	74.15	27	.209
Cutting Car Co	Box	100	500	100	Box	23.49	3,092	18.48	8	.05
Interstate Stock Express	Double-deck stock	20	849	25	Hogs, sheep, calves	153.56	25,500	153.56	70	.42
Kingan Refrigerator Line	Refrigerator	515	900	25	Meat, packing-house products	194.10	25,900	194.10	70	.53
Lackawanna Live Stock Transportation Co	Stock	320	600	25	Live stock	187.32	31,219	187.32	86	.511
Lemp Refrigerator Co	Refrigerator	750	1,191	250	Brewery products	179.40	18,817	179.40	52	.49
Do	do			25	do	182.67	19,260	182.67	53	.50
Milwaukee Refrigerator Transit & Car Co	do	503	1,000	25	do	259.87	26,844	230.76	74	.66
National Manufacturing Co	Double-deck stock	300	819	25	Live stock	193.50	32,925	193.50	90	.53
National Transportation & Terminal Co	Tank	50	670	25	Turpentine	116.12	15,719	117.90	43	.32
Prentice & Gamble Transportation Co	do	532	973	25	Cottonseed oil, grease, tallow	89.25	11,912	89.25	32	.24
St. Louis Refrigerator Car Co	Refrigerator	1,123	700	1,123	Brewery products	234.72	24,697	220.85	68	.60
Swift Live Stock Transportation Co	Palace horse	6	5,001	6	Thoroughbred stock	1,000.7	50,002	1,000.20	135	2.99
	Single and double deck stock	531	405	25	Live stock	104.63	17,416	104.63	48	.286
Swift Refrigerator Transportation Co	Tank	7,621	1,200	25	Cottonseed oil, lard, tallow, etc	151.85	14,223	107.18	39	.294
	Refrigerator		1,167	25	Fruits, vegetables, products	277.27	16,406	125.61	45	.344
	do		1,110	25	Meats, packinghouse products	210.21	25,168	209.40	69	.57
Union Refrigerator Transportation Co	do	2,150	785	2,150	Brewery products	187.80	20,661	186.54	57	.51

American Asphaltum & Rubber Co.	Tank	30	$1,179	25	Liquid asphaltum	$91 56	11,282	$84 45	31	$0.224
American Cotton Oil Company	do	733	875	25	Cottonseed oil	101 24	12,809	90 82	34	.257
American Linseed Co.	do	222	750	25	Linseed oil	85 61	11,415	85 61	31	.23
American Maize Products Co.	do	33	1,179	33	Glucose, corn oil	95 25	12,700	95 25	28	.26
Atlas Coke Co.	Coke	66	1,382	66	Coke	59 77	9,961	59 77	27	.16
Beech Nut Packing Co.	Refrigerator	5	1,388	5	Packing-house products	162 02	21,603	162 02	59	.44
Callahan, A. P., & Co.	Tank	3	1,602	3	Vinegar	47 58	6,333	47 58	18	.13
Chanute Refining Co.	do	101	900	25	Petroleum and its products	92 63	12,350	92 63	34	.25
Chanute Oil Abattoir Co.	Refrigerator	92	1,200	5	Packing-house products	185 76	25,302	185 76	69	.51
Cottewanga Refining Co.	Tank	74	600	34	Petroleum and its products	71 64	9,545	71 64	26	.20
Crescent Brewing Co.	Refrigerator	3	973	3	Brewery products	112 57	11,257	112 57	51	.31
Crew Levick Co.	Tank	57	721	27	Petroleum and products	116 60	15,548	116 60	43	.32
Cudahy Packing Co.	Refrigerator				Meats, packing-house products	283 09	31,400	283 09	86	.778
Do	Tank	1,618	1,135	25	Oils, grease, and fats	119 13	15,884	119 13	44	.327
Cudahy Refining Co.	do		1,200	33	Petroleum and products	92 52	12,335	92 52	34	.25
Do	do	319	795	319	do	71 08	9,477	71 08	26	.20
Cudahy Bros. (Milwaukee)	do		1,000	25	Lard, etc	56 04	7,472	56 04	20	.15
Do	Refrigerator	253	725	2	Meat, packing-house products	179 06	19,357	179 06	53	.49
Dingee, Squire & Co.	Tank		725	251	Pickles	30 00	4,002	30 00	11	.09
Goodwin Mfg. Co.	do	11	727	11	Tallow, grease	70 00	5,454	60 90	15	.11
Gulf Cooperage Co.	Rock	20	1,250	20	Empty barrels	56 40	9,401	56 40	26	.15
Hively Bros.	Tank	20	900	23	Lard	91 44	12,192	91 44	33	.25
Heinz Co., H. J.	Refrigerator	2	1,145	2	Food products	126 26	15,406	126 26	42	.33
Do	Tank	152		27	Pickels in brine	71 08	9,475	71 08	26	.20
Hill, J. F.	do	51		25	Liquid asphaltum	90 01	12,000	90 01	33	.247
Hormel & Co., Geo. A.	Refrigerator	1	1,140	1	Packing-house products	114 70	11,470	114 70	31	.31
Interstate Cooperage Co.	Rock	9	1,163	9	Stove bolts	13 98	2,330	13 98	6	.04
Jemison Coal & Coke Co.	Coal	43	700	25	Oil, soap fats	83 26	13,894	83 26	38	.23
Kirk, Jas. S., & Co.	Tank	1,500	1,027	1,000	Coal	54 82	7,308	54 82	20	.15
Lewis, F. J., Mfg. Co. (Northern Tank Line)	do	20	1,000	20	Pitch, turpentine, asphaltum, creosote	59 16	7,888	59 16	22	.16
Libby, McNeill & Libby	Refrigerator				Food products	100 17	11,965	100 17	33	.274
Do	do	79	925	20	do	198 94	23,430	198 94	64	.545
Maryland Steel Co.	Coal		700	5	Coal	86 75	8,492	81 15	23	.14
Matthiessen & Hegler Zinc Co.	Tank	499	1,246	499	Sulphuric acid	63 91	8,521	63 91	23	.18
Mineral Point Zinc Co.	do	83	815	25	Acid	62 45	8,326	62 45	23	.171
Morris & Co.	do	82	1,195	82	Meats, packing-house products	216 28	25,939	216 28	71	.592
Do	Refrigerator		913	23	Live stock	83 30	13,823	83 30	38	.23
Do	Stock	2,411	237	226	Oils, grease, fats	97 14	12,955	97 14	35	.266
National Ammonia Co.	Tank		1,293	19	Ammoniacal liquors	71 40	9,520	71 40	26	.19
National Pipe Line Co.	do	16	1,400	16	Petroleum and products	107 19	14,295	107 19	50	.29
Petroleum Products Co., The	do	568	1,250	25	do	79 40	12,989	97 40	36	.267
Quaker Oats Co.	do	157	1,004	25	Molasses	45 24	6,039	45 24	17	.12
Reid, Murdock & Co.	do	17	868	17	Pickles	35 15	4,687	35 15	13	.096
	do	5	992	5						

[1] The total earnings of private cars include such items as mileage, per diem in lieu of mileage, rental of cars, commissions for soliciting and handling freight, shipments, refrigeration and heating service, and other miscellaneous earnings.

[2] Car line not separately incorporated.

TABLE 3.—*Statement showing the performance of private cars of different kinds as operated by different classes of car owners or operators, compiled from reports submitted by private car owners*—Continued

CLASS D.—INDIVIDUALS, COMPANIES, AND CORPORATIONS OPERATING CARS USED CHIEFLY FOR TRANSPORTING FREIGHT IN WHICH OWNERS OF CARS ARE INTERESTED—Continued

Name of individuals, companies, and corporations operating cars	Cars operated		Average cost per car	Cars reported on hand	Cars used chiefly for—	For car per year			For car per day	
	Kind	Number				Average earnings from all sources	Average miles run	Average mileage earnings	Average miles run	Average mileage earnings
St. Louis Independent Packing Co	Refrigerator	200	$1,273	200	Meats, packing-house products	$170.16	21,282	$170.16	58	$0.46
Southwest Zinc Co	Tank	4	1,300	4	Chloride zinc, sulphuric acid	22.76	3,131	22.76	9	.062
Southern Cotton Oil Co	...do	425	900	25	Cottonseed oil	66.79	8,908	66.79	24	.18
Sloper & Sons Piano Mfg. Co	Box	12	629	12	Pianos	29.27	4,800	29.27	2	.08
Shotz, Joseph & Sons	Stock	50	300	50	Live stock	178.83	26,971	178.83	82	.492
Stonecoal Coal Mining Co	Coal	50	1,267	50	Coal	95.20	13,856	95.20	44	.26
Taylor Coal Co. of Kentucky	...do	21	740	21	...do	26.26	3,277	26.26	9	.054
Texas Co., The	Tank	1,183	1,214	23	Petroleum and products	97.02	11,904	97.02	22	.24
Do	Box		1,225	12	...do	66.55	7,580	66.55	23	.174
United Coal Co	Coal	1,000	900	25	Coal	72.10	12,014	72.10	33	.20
Woelke & Co., Wm	Tank	1	1,100	1	Solvents of soda	80.85	10,780	80.85	30	.22
Waters Pierce Oil Co	...do	325	982	200	Petroleum and products	59.59	7,905	59.59	22	.16
Do	...do		900	21	...do	67.52	9,259	67.52	23	.18

1416 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 31st day of July, A. D. 1918

No. 4906. In the Matter of Private Cars

This proceeding having been duly initiated, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that all carriers by railroad, subject to the act to regulate commerce, as they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before October 15, 1918, and thereafter to abstain, from publishing and paying to owners of tank cars their present allowance of three-fourths of a cent for loaded and empty movements of such tank cars in interstate commerce, and their present allowances for the use of live poultry and palace stock cars, and heater cars, used in shipments moving in interstate commerce over their respective lines or routes.

It is further ordered that said carriers, be, and they are hereby, notified and required to establish, on or before October 15, 1918, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the transportation of tank cars, live poultry cars, palace stock cars, and heater cars owned by private individuals or corporations, 1 cent per mile on the loaded and empty movements over their respective lines, in interstate commerce.

It is further ordered that said carriers be, and they are hereby, notified and required to establish, on or before October 15, 1918, upon notice to this commission and to the general public by not
1417 less than five days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter maintain and apply a rule in their tariffs to the effect that when privately owned cars are standing on the tracks of the owners, they shall not be subject to demurrage charges.

And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

1418 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report of the commission filed June 11, 1920, In Re Assignment of Freight Cars, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

1419 Interstate Commerce Commission

In Re Assignment of Freight Cars

1420 June 11, 1920

By Senate Resolution No. 376 the Interstate Commerce Commission was directed to inform the Senate upon what authority, if any, its order of April 15, 1920, entitled "Notice to carriers and shippers," was issued.

Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars and cars for the carrier's own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. In other words, all such cars were given to the mines for which they were intended, and such mines were given in addition their full share of the other cars available for distribution. This practice was complained of as unreasonable and unduly prejudicial, and in R. R. Com. of Ohio et al. v. H. V. Ry Co., 12 I. C. C. 398, decided July 11, 1907, the commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned, but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the mine to which given it should be given additional cars only sufficient to make up its distributive share.

In the report in this case it was pointed out that in U. S. ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co., 165 Fed. 113, a similar decision was made as to private cars and a contrary decision as to foreign railway fuel cars, but that in Logan Coal Co. v. Penna. R. R. Co., 154 Fed. 497, it was held that such foreign railway fuel cars should be counted against the mines to which they were consigned.

1421 Among other considerations mentioned in the commission's report was the fact that a railroad company would not send its cars on to the lines of another railway company even for its own fuel supply if they were to be diverted from that intended use and distributed among others than those to whom they were consigned for loading to various destinations on the lines of other carriers, thus rendering the fuel supply of the carrier sending the cars uncertain and depriving it of the use of its equipment.

In Traer v. Chicago & Alton R. R. Co. et al., 13 I. C. C. 451, decided April 13, 1908, the same questions were presented that had been presented in R. R. Com. of Ohio et al. v. H. V. Ry. Co., supra, and the additional question of the reasonableness of the carrier's failing to count against the mines to which they were delivered cars for loading with its own railroad fuel. The commission followed the decision in R. R. Com. of Ohio et al. v. H. V. Ry. Co., supra, and in addition held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from which such fuel supply is received, but that if such mine or mines also ship commercial coal fuel cars so supplied must be counted against the mine or mines under the rule laid down in R. R. Com. of Ohio et al. v. H. V. Ry. Co., supra.

In this case it was said that if a contract for fuel covers such supply as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel, even though it thereby deprived shippers of desired use thereof; that this right to so use its cars did not rest upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor considerations of public policy which recognized the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and the public. Recognizing the right of the carrier to secure its fuel supply either from mines which it owns or those the entire output of which it purchases, it was held that where the carrier purchases a portion of the output of a mine which is also producing commercial coal it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, decided June 2, 1908, the rule laid down in R. R. Com. of Ohio et al. v. H. V. Ry. Co., supra, was again followed, and it was said that the ownership of a private car gives to the owner no superior rights to use the facilities of the carrier in transporting it; that the owner-
1422 ship of a private car or the possession of a foreign railway fuel car gives to a coal operator no preferred right to have it occupy a carrier's sidings or tracks as against a system car loaded by another operator, or to have it handled in trains in preference to a system car, and that when any of these general facilities are insufficient to

move all the traffic offered no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines.

In Interstate Com. Com. v. Ill. Cent. R. R. Co., 215 U. S. 453, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commission in R. R. Com. of Ohio et al. v. H. V. Ry. Co., supra, and in Traer v. Chicago & Alton R. R. Co., supra, and held that the act to regulate commerce delegated to the commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means of prohibiting undue preference and unjust discriminations.

In Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C. 356, decided March 7, 1910, the above decision of the Supreme Court was referred to in pointing out that the orders of the commission with respect to the distribution of coal cars by interstate carriers remained unaffected by attacks that had been made upon them in the courts, and that further consideration of these questions in connection with this group of cases had confirmed the conviction that the general principles underlying the disposition made of previous cases were both sound and just. The rule applied by the carrier in the Hillsdale case was described, its effect was explained, and it was condemned as giving undue advantage in distribution to certain mines and as contrary to the previous decisions of the commission. In a supplemental report in this case, 23 I. C. C. 186, reparation was awarded for damages resulting from the discrimination which had been practiced and found.

In Penna. R. R. Co. v. Clark Coal Co., 238 U. S. 456, decided June 21, 1915, the commission's award of reparation in Hillsdale Coal & Coke Co. v. P. R. R. Co., supra, was sustained by the Supreme Court notwithstanding the fact that an action had been brought in a State court on the same subject before the commission had made its award of reparation. The Supreme Court held that where a complaint involved practices of carriers in distributing cars for interstate shipments no action is maintainable in any court for damages alleged to have been inflicted thereby until the commission has made a finding as to the reasonableness of such practices.

1423 In the commission's report of June 9, 1914, to the Senate and House of Representatives in Coal and Oil Investigation, 31 I. C. C., 193, it said at page 218.

"As to actual distribution of cars in accordance with the relative ratings of the mines, the opinion of the Commission is clearly set forth in Traer v. C. & A. R. R. Co., 13 I. C. C., 454, and it was sustained by the Supreme Court of the United States in 215 U. S., 452 and 479. Formerly, few of the roads counted against the mine ratings company fuel cars (i. e., cars to be loaded with the carrier's own fuel); private cars (i. e., cars owned or leased by coal companies); or foreign consigned cars (i. e., cars delivered by foreign roads for loading at particular mines). In the case just cited, the Commission

ruled that all three classes of cars should be counted against the ratings as well as those furnished for commercial loading. In cases where the carrier takes the entire output of a mine, however, it has been considered permissible to deduct the number of cars delivered to that mine from the available supply before prorating among mines shipping commercial coal, or both commercial and railroad coal."

The rule of law on this subject thus established remained the controlling rule for carriers generally, and apparently without friction or controversy, until during the war and under the rules of the Fuel Administration, including its zoning system, and while the roads were under federal control, the rule was changed and the use of assigned cars for loading with railroad fuel was abandoned. This change was followed by the imperative necessity of railroads resorting to confiscation of coal in transit in order to keep their roads in operation. In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel.

When federal control terminated there was in effect on all roads under federal control a set of rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association, and in order that there might not be confusion because of different lines of action being followed by different individual roads the commission on March 2, 1920, issued a notice to carriers and shippers recommending that until experience and study demonstrated that other rules would be more effective and beneficial the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (revised) be continued in effect.

With the suspension of the activities of the Fuel Administrator and regulations which he had prescribed some railroads that did not have more than two or three days' supply of coal and that were and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mines were sued for damages on account of such confiscation, injunctions were sought in the State courts
1424 against the practice of confiscation, and when it was learned that the carriers were contemplating return to the use of assigned cars injunctions were sought in State courts against the same carriers restraining them from using assigned cars. Numerous informal conferences were had between the commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carrier could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A conference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestion to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon

them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply.

Rule 8 of the Railroad Administration's rules which the commission had recommended be adhered to until experience and study demonstrated that some other rules would be more effective and beneficial was as follows:

"8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as 'assigned' cars. All other cars will be designated, as 'unassigned' cars."

It will be noted that under this rule private cars, some of which are owned and used by coal operators, and cars assigned to the mines by the car service section of the Railroad Administration for railroad fuel or for other purposes were desinated and treated as "assigned" cars. All other cars were designated and treated as "unassigned" cars.

Rules 9 and 10 of the Railroad Administration's rules were as follows:

"9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

It will be noted that under these rules the "assigned" cars were treated in the same manner as railway fuel cars were treated under the commission's decisions in the cases hereinbefore cited.

Under the conditions that have been briefly outlined the commission on April 15, 1920, changed its recommendation of
1425 March 2, 1920, and recommended that until further experience and study demonstrated that other rules will be more effective and beneficial the Railroad Administration's rules be continued in effect except that rule 8 should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Com. of Ohio et al. v. H. V. Ry. Co., I. C. C. 398, and Tracy v. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

The commission also expressed the opinion that an emergency existed requiring immediate action and in the exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, it suspended the operation of the then existing rule 8 and directed the

observance of rule 8 modified as above, effective April 16, 1920, and until further direction or order of the commission.

Paragraph (12) of section 1 of the interstate commerce act, as amended by section 401 of the transportation act, 1920, declares it to be the duty of every carrier by railroad to make just and reasonable distribution of cars for the transportation of coal among the coal mines served by it whether located on its line or lines or customarily dependent upon it for car supply, and to maintain and apply just and reasonable ratings of such mines during any period when the supply of cars available for such service does not equal the requirements of the mines, and to count each and every car furnished to or used by any such mine for transportation of coal against the mine, and provides a specific penalty for failure or refusal to comply with these requirements.

Paragraph (5) of section 1 of the interstate commerce act, as amended by section 400 of the transportation act, 1920, provides that charges made for any service rendered or to be rendered by carriers subject to the act shall be just and reasonable. The act does not attempt to define in detail what is a just and reasonable rate, fare, or charge, or what is a just and reasonable distribution of cars or rating of mines. The commission is authorized to determine what is a just and reasonable charge for transportation or what are just and reasonable rules for distribution of cars or rating of mines.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, authorizes the commission whenever it is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and to make such just and reasonable directions with
1426 respect to car service as in its opinion will best promote the service in the interest of the public and the commerce of the people. The commission's direction of April 15, 1920, was issued under authority of that paragraph.

The commission is of opinion that paragraph (12) of section 1 of the interstate commerce act does not change the rule of law laid down in the Hocking Valley and Traer cases, supra. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the commission and of the Supreme Court of the United States.

No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under Federal control and the production, distribution, and marketing of coal was under a war-time Federal administration. The passing of the roads from Federal control and the suspension of

the operation of the Fuel Administration's rules, together with the transportation conditions and shortage of fuel on hand, created an emergency in which the commission acted in accordance with its best judgment. Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rule to which some objections have been made. No one has suggested such a substitute rule. The nearest approach to it has been an expressed belief that a form of preferential contract could be devised under which the contracting railroad would have first call upon the output of a mine but so far as we are advised no such form of contract has been framed. It seems not inappropriate to say that the coal operators are not able to entirely agree among themselves as to the advantages or disadvantages of the assigned car practice.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, authorizes the commission to direct priorities in transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

Copies of United States Railroad Administration's Car Service Section Circular CS-31 (revised) and of the commission's direction of April 15, 1920, are appended hereto and made a part hereof.

1427 APPENDIXES

APPENDIX 1

United States Railroad Administration, Director General of Railroads, Division of Operation, Car Service Section

CIRCULAR CS-31 (REVISED)

WASHINGTON, *December 23, 1919.*

To Railroads:

The following rules are promulgated to govern uniformly the rating of coal mines (other than anthracite) and car distribution to such mines. They will supersede the rules contained in Car Service Section Circular CS-31, and are to be made effective on all railroads loading coal (other than anthracite) in season to permit car distribution to be made in accordance therewith, beginning January 10, 1920.

RULES FOR RATING FOR CAR DISTRIBUTION PURPOSES COAL MINES (OTHER THAN ANTHRACITE) LOADING COAL AT MINE TIPPLES

The following rules shall govern the rating of coal mines (other than anthracite) as the basis for the distribution of empty cars to such mines:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric, or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine and shall be the basis on which cars shall be distributed to it; provided, that if track or other limiting conditions further restrict its ability to ship via (note a) ..... railroad, such conditions shall be the limiting factor for the (note a)..... railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple, or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of
1428 hours worked (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mine shall be increased to include the average tonnage per day so diverted in the previous month until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing the new daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresponding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraph a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time) on the tipple until the dumping of coal finally ceases for the day,

making deductions for the noon intermission when it is taken and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b, and c.) Time may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full calendar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars sufficient to enable it to work freely in the course of development for a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the ..... (note b) ..... promptly at the close of each day:

1. The number of hours in the recognized workday;
2. The established time for beginning the day's work;
3. Actual time work was begun this day on the tipple;
4. If the noon hour intermission is taken, how long;

1429 5. Time lost during the day account:

Waiting for railroad cars or other railroad disability	hours;
Strikes or mine labor shortage	hours;
Mine disability	hours;
No market	hours;
All other causes	hours;

6. Time work on tipple ceased for day;

7. Number of hours worked to-day on the tipple, ...; and in the mine, ... (See paragraph c);

8. Number of net tons of coal loaded for shipment via ..... (note a) ..... railroad;

9. Total number of net tons of coal produced and shipped via each other outlet.

Joint mines shall furnish this daily report to each carrier serving them.

If after notice from the railroad an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a prescribed form to the ------ (note b) ------ having jurisdiction, separately for each mine for each month, as follows:

1. Number of hours in the recognized workday;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the ------ (note a) ------ railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month. (See paragraph e.)

This report must be forwarded not later than the 3d of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded, and the sworn report forwarded not later than one week after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroads cars the tonnage shipped, and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as soon as such ratings are ascertained to such coal mines on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines and all districts on this railroad, and the percentage of each such figure to the total.

NOTE a.—Designate the name of issuing railroad.

NOTE b.—Designate title of proper officer of issuing railroad.

RULES GOVERNING THE DISTRIBUTION OF CARS TO COAL MINE TIPPLES (OTHER THAN ANTHRACITE)

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads it shall be entitled only to empty
1430 cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars can not be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days only and at such mines only as may elect to work, and overs and shortages in car supply resulting from this distribution shall be adjusted on succeeding days.

4. Each mine operator shall report to the car distributor at ..... (note 1) ..... p. m. daily:

(a) Number of unconsigned loads on hand at 7 a. m.

(b) Number of empty and partly loaded cars on hand at 7 a. m.

(c) Additional number of empty cars received during the day.

(d) Aggregate number of empty cars received during the day.

(e) Number of cars loaded during the day.

(f) Number of empty cars standing over at close of day.

(g) Number of empty cars standing over at close of day which were received prior to 7 a. m., ... cars; and prior to 10 a. m., ... cars.

(h) Number of partly loaded cars under tipple at close of day.

(i) Number of unconsigned loads on hand at close of day.

(j) Additional number of empty cars required for loading following day.

(k) Note 2.

Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combined requisitions must not exceed the gross daily rating of the mine.

5. The recognized standard car for coal-car distribution is 50 tons. Others are compared thereto by tenths of a car; i. e., 80,000 pounds capacity equals eight-tenths (.8) of a car; 140,000 pounds capacity one and four-tenths (1.4) cars, etc., and cars must be charged and car-distribution records maintained accordingly.

6. (a) All cars placed at a mine during each period of 24 hours ending at 10 o'clock a. m. (or when Sundays or holidays intervene, the longer period ending at 10 o'clock a. m. of the day immediately succeeding the Sunday or holiday) shall be charged against the mine on the day when such period ends; provided, that if the cars placed at 7 o'clock a. m. (not including partly loaded cars) do not equal or exceed in number 25 per cent of the daily rating (or order if less than the rating) then no cars will be charged against the mine that day except such as are loaded on that day.

(b) Cars placed between 10 o'clock a. m. and the time the mine ceases work for the day, if loaded or partly loaded on the day placed, will be charged against the mine on that day.

(c) All cars of other than railroad ownership (commonly called "private cars") placed for owners' loading will be considered as ordered.

7. The pro rata share of cars to which each mine is entitled, except as provided in rule 9, shall be based on its rating (or order

when less than its rating). When a mine has empty or partly loaded cars which were placed prior to 7 a. m., or unconsigned loads
1431 standing over at the close of the day's business, such cars shall be charged against it each service day thereafter while they are detained, except as otherwise provided in rule 6.

If on any day a mine be furnished with cars totaling less than 100 per cent of its rating (or order if less than its rating) and for any cause whatever other than railroad responsibility fails to load the entire number, the mine shall be considered as having been furnished 100 per cent of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in rule 6 (and after eliminating assigned cars as provided in rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

12. A statement showing the car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal-loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

NOTE 1. Hour may be named by the issuing railroad.

NOTE 2. Issuing railroad may ask additional necessary information pertaining to car supply.

W. C. KENDALL,
Manager Car Service Section.

Approved:
W. T. TYLER,
Director Division of Operation.

APPENDIX 2

Interstate Commerce Commission, Washington

APRIL 15, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of Government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

1432 The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Com. of Ohio et al. v. H. V. Ry. Co., 12 I. C. C., 398, and Traer v. Chicago & Alton Railroad Co. et al., 13 I. C. C., 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

The commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the commission.

By the commission.

GEORGE B. MCGINTY,
Secretary.

1433 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered June 13, 1923, in case No. 12530, In Re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 28th day of May, A. D. 1925.

[SEAL.] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

1434 Interstate Commerce Commission

Assigned cars for bituminous coal mines. No. 12530. In re distribution among coal mines of privately owned cars and cars for railroad fuel.

1435 Submitted March 2, 1923. Decided June 13, 1923.

1. Paragraph (12) of section 1 of the interstate commerce act held not in terms to prohibit the practice of assigning cars for railway fuel and private cars to coal mines under the limitations fixed in R. R. Com. of Ohio v. H. V. Ry. Co., 12 I. C. C., 398, and Traer v. C. & A. R. R. Co., 13 I. C. C., 451. Assignment of Freight Cars, 57 I. C. C., 760, followed.

2. The practice of respondents in assigning private cars, and systems or foreign-line cars for railway fuel, to bituminous coal mines in excess of the ratable share contemporaneously distributed to bituminous-coal mines upon their lines which do not receive assigned cars, found for the future to be unjust and unreasonable, and unduly and unreasonably prejudicial to mines not receiving assigned cars and unduly preferential of mines which are furnished such cars in excess of the ratable proportion. Cars specially placed by order of the commission under the provisions of paragraph (15) of section 1 of the act may properly be treated as assigned cars, and need not be taken into account in determining the ratable distribution when the order of placement so requires.

Henry Wolf Biklé, J. C. Bills, W. S. Bronson, H. T. Dick, O. W. Dynes, R. V. Fletcher, August G. Gutheim, W. R. McFarland, W. A. Northcutt, H. R. Preston, C. J. Rixey, C. M. Sheafe, jr., D. Lynch Younger, F. M. Rivinus, Frank W. Gwathmey, and J. H. Fishback for respondents.

Frederic L. Ballard and Jas. W. Carmalt for private coal-car owners.

Butler, Lamb, Foster & Pope, E. S. Ballard, and Carl D. Loos for National Coal Association; A. M. Liveright for Central Pennsylvania Coal Producers' Association; L. C. Boyle and George N. Brown for Southern Ohio Coal Exchange; R. W. Ropiequet for Illinois Coal Traffic Bureau; and Eugene McAuliffe for Union Colliery Company, King Harlan Coal Company, Union Electric Company, Detroit Edison Company, and Milwaukee Electric Railway & Light Company.

1436 J. J. Kinner for United Mine Workers of America, District No. 2; Albert L. Vogl and Harry F. Nash for Colorado & New Mexico Coal Operators' Association; Jonas Waffle for Indiana coal operators; and S. C. Higgins for New River Coal Operators Association.

REPORT OF THE COMMISSION

AITCHISON, Commissioner:

This is a proceeding of investigation upon our own motion, entered upon March 22, 1921, with respect to the reasonableness and propriety of the present car-distribution rules of the respondents, all the steam-railroad carriers subject to our jurisdiction, in so far as they apply to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just and reasonable rule or regulation as may appear to be necessary. Later, we instituted another proceeding of investigation, No. 13896, In Re Rules Governing Ratings of Coal Mines Other Than Anthracite and Distribution of Cars to such Mines, which brought before us as to the same respondents the propriety, justness, and reasonableness of the existing mine-rating rules and rules for the distribution of cars as between mines of the class indicated in the title of that proceeding. For procedural purposes the two investigations were consolidated, and a great amount of testimony of wide scope was taken, applicable as might be to one or the other or both of the consolidated proceedings. Thereafter we severed the two proceedings, and No. 12530 has been submitted for determination, while No. 13896 remains unsubmitted.

Essentially involved is the practice of the carriers as to what are commonly known as assigned cars for the loading of coal. Throughout the hearing the testimony dealt with the practices of the railroads using bituminous coal for fuel, and our present determination will likewise be so limited. References to coal herein may be taken as meaning bituminous coal, unless the context shows that anthracite was intended to be included. The inquiry necessarily involves the right to make an assignment or designation of certain cars to specific mines for definite shippers or consignees, and the rule to be observed in times of car shortage in counting such cars in the distribution of equipment among the various mines upon the railroad or a division. The propriety of the practice
1437 raises the question as to whether it is in terms forbidden by law; and if not so proscribed, whether the practice is just and reasonable and otherwise conforms to the tests of the interstate commerce act. Three classes of cars are involved: (1) System cars, or cars of railroad ownership, set for loading upon the line of the owning carrier or such as may be on its line of railroad and not owned by some specific shippers or restricted as to use; (2) cars for foreign railway fuel, which are delivered to another carrier consigned to particular mine operators for loading with fuel for the use of the delivering carrier and return to it; and (3) private cars, which include cars owned or leased or subject to the exclusive control of particular persons, not carriers by railroad, who deliver them to the railroad for placement at designated mines for loading and subsequent transportation as desired by the private-car owners. The coal to be transported in the private cars may or may not be intended eventually to be used for railroad fuel.

Counsel for respondents thus summarize the manner in which assigned cars are placed and how they are counted, in connection with other cars, in determining the cars to which mines are entitled when, by reason of car shortage, it is necessary to distribute the available equipment on a basis less than the aggregate of orders based on the respective mine ratings:

"Assigned cars must be placed at mines to which assigned.

"If the number of assigned cars exceeds the number of cars to which the mine is that day entitled under the rate of coal car distribution, the mine is not entitled to any additional cars for commercial coal loading that day.

"If the number of assigned cars does not equal the number of cars to which the mine is that day entitled under the rate of coal car distribution, the mine shall be given enough system cars in addition to bring its total placements that day up to the number to which it is entitled."

Throughout this report the term commercial mines will be understood as referring to a mine which does not receive assigned cars.

As to each of these three classes of assigned cars the issue is presented whether the law in terms forbids the present practice of the respondents, and if not, whether we should find upon the record that the present practice is in any respect unjust and unreasonable or otherwise in violation of any provision of the interstate commerce act. In the consideration of these questions, we should have in mind the provisions of paragraphs (10), (11), (12), and (14) of section 1. For convenience, these para-
1438 graphs are stated in the margin.[1] Paragraph (1) of section 3 also must be considered.

Paragraph (12) was the fourth paragraph of section 402 of the transportation act, 1920, and thus was added to and became a part

[1](10) The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

(11) It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily depended upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(14) The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

of section 1 of the interstate commerce act, February 28, 1920. It will be necessary to bear in mind the requirement found in paragraph (6) of section 1, which in effect may be said generally to impose the duty upon all common carriers subject to the provisions of the act to establish, observe, and enforce just and reasonable transportation regulations and practices. It will also be essential to have before us paragraphs (15), (16), and (17) of section 1 of the act, which permit us in times of emergency to suspend the operation of any or all of the rules, regulations, or practices then established for such time as we may determine, and to give necessary directions as to car service so as best to promote the service in the interest of the public and the commerce of the people, and authorize us to give preference and priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as we may determine. The powers conferred upon us in the three paragraphs last mentioned have been exercised repeatedly.[1]

The respondents have proposed for approval a code of rules as to mine ratings and car distribution. As to the assignment and counting of private cars and cars for railroad fuel, their proposal is found in the following suggested rules:

1439 "(8) Private cars, such cars as are assigned to mines for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in R. R. Commission of Ohio, et al. v. H. V. Ry. Co., 12 I. C. C. 398, and Tracy v. Chicago & Alton Railroad Co. et al., 13 I. C. C., 451, and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

"(9) If the number of assigned cars placed at a mine during any period, as provided in rule 8, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

"(10) If the number of assigned cars placed at a mine during any period, as provided in rule 8, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

The rules proposed have the general support of the respondent carriers. They are opposed in their entirety by many associations of mine operators and representatives of mine labor. The National Coal Association, an organization with a large and widespread membership of bituminous-mine operators throughout the United States, opposes the rules in their application to railroad fuel, but takes no position as to the assigned private cars.

[1] 34th Annual Report of Commission, page 11; 36th Annual Report of Commission, page 9.

I

The rules proposed are the same as those in effect when the present proceeding was instituted, upon the lines of respondents which followed the practice of assigning cars, except for the addition of the words "and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission," in the first rule quoted. It seems to be taken by all parties that the rules quoted, so far as they relate to railroad-fuel cars, expressly promulgate the practice which was put into effect by the carriers following our decision in R. R. Com. of Ohio v. H. V. Ry. Co., supra, and in Traer v. C. & A. R. R. Co., supra, which we will hereinafter refer to as the Hocking Valley case and Traer case, respectively. The railroads, proponents of the rules quoted, rely upon the authority of those decisions and subsequent decisions applying or sustaining them; while the opponents of the rule contend that the proposals are distinctly counter to the mandate contained in paragraph (12) of section 1 as to the distribution and counting against the mine of all cars furnished or used for the transportation of coal. The opponents of the proposed rules also contend that the assignment of cars as contemplated is an unjust, unreasonable, and unjustly preferential and prejudicial practice in violation of paragraph (6) of section 1, and paragraph (1) of section 3 of the act.

1440 The question of the legality of the practice of assigning cars for railroad fuel substantially in the method outlined in the proposed rules was so carefully considered by us in Assignment of Freight Cars, 57 I. C. C., 760, that but for an attack upon the authority of that report as a precedent we would not deem it necessary to further examine the matter, as there has since been no change in the statute law and the weight of judicial authority has supported the construction we there placed upon paragraph (12) of section 1. But the protestants have pointed out, properly, that the report cited, made in response to a resolution of the Senate of the United States, was necessarily of an ex parte character, and we have accordingly permitted all parties to be heard fully upon this basic question.

A brief review of our previous decisions involving this subject will be helpful.

Prior to 1907 the railroads commonly delivered to coal mines cars privately owned or leased, foreign railway-fuel cars, and cars for the carriers' own fuel loading, according as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal. It was the usual practice to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. All such cars were given to the mines for which they were intended and such mines received in addition their full share of the other cars available for distribution. Thus the cars assigned were not counted against the mine, as the phrase commonly ran.

The practice of the carriers in not counting foreign railway-fuel cars and private cars against the mines to which consigned or as-

signed was brought before us by complaints filed by the Railroa Commission of Ohio against the Hocking Valley Railway Compan and the Wheeling & Lake Erie Railroad Company, respectively which were disposed of together. The second case involved the so called private cars, claimed to have been bought by certain coal oper ators, which were not included in or charged against the percentage in distribution of cars to coal-mining companies. Both complaint put in issue the practice of defendants in permitting the assignmen of foreign railway-owned fuel cars consigned to certain coal com panies with which the foreign railway had contracts stipulating fo the furnishing of cars, and failing to count them against the mines The basis of both complaints was unjust discrimination under th law as it then stood. And, although the right of the commission t prescribe a regulation or practice in respect to transportation which was just, fair, and reasonable to be thereafter followed was adverted to, the basis of our decision was discrimination. Our decision, 1441 made July 11, 1907, has been cited. We held in effect that the private cars and foreign railway-fuel cars as described should be given to the mines to which they were consigned or assigned, but must be counted against the distributive share of the mines. If such specially consigned or assigned cars equaled or exceeded the distributive share of a mine receiving them, the mine should have no additional cars, but if not equal to the distributive share, it should be given only sufficient additional cars to make up its distributive share.

In the Traer case, April 13, 1908, we followed the Hocking Valley case, and further held that cars used by defendants upon their own lines for transportation of their own necessary fuel supply may be given in any numbers to the mine or mines from which such fuel supply is received, but if such mine or mines also ship commercial coal the fuel cars so supplied must be counted against the mine or mines. An order was made to carry the findings of discrimination into effect. Injunction proceedings brought against the commission by interested carriers resulted in a decree of the Circuit Court of the United States for the Northern District of Illinois enjoining the effect of the order so far as it required carriers to count their own fuel cars against the mine shares, but the order was sustained in other respects. Chicago & A. R. Co. v. Interstate Commerce Commission, 173 Fed., 950. On appeals by the commission the Supreme Court reversed the decree of the lower court and held the act had delegated to us authority to determine on complaint the question of distribution of the carrier's own freight cars in times of car shortage as a means of prohibiting the undue preference and unjust discrimination forbidden by the act. Power to make the order, and not the expediency or wisdom of it, was the essential issue before the court. Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S., 452, id. v. C. & A. R. R. Co., 215 U. S., 479.

The rule laid down by us in the Hocking Valley case was followed in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C., 86, and in

Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356. In the last-cited case a rule applied by the carrier was condemned as giving undue advantage in distribution to certain mines and as contrary to the decisions of the commission previously referred to, and in a subsubsequent report, 23 I. C. C., 186, reparation was awarded. The award of reparation was later sustained by the Supreme Court. Penna. R. R. v. Clark Coal Co., 238 U. S., 456.

In our report to the Senate and House of Representatives in Coal and Oil Investigation, 31 I. C. C., 193, 218, we repeated the substance of what we had found in the Hocking Valley and Traer cases. We expressed the view that when the carriers should adjust their rules in accordance with the views of the commission as ex-
1442 pressed in the cases cited (and others) no doubt many of the irregularities found to exist would be eliminated.

The rule thus limiting the permissible assignment of cars either privately or railroad owned without counting them against the distributive share of the mines was definitely established and remained in effect as a rule in a state of repose until the advent of Federal control over the railroads and over the production, distribution, and price of coal. That rule was substantially as found in rules 8, 9, and 10 proposed by the respondents, with the exception of reference to cars specially assigned by our order, which is a new addition. The rule was accepted as settled, and although never acquiesced in by commercial mine operators as settled on the right basis, was not the subject of any formal complaint to which our attention has been directed down to the period of Federal control.

The United States Fuel Administration put into effect a zoning system for the distribution of coal. About July 1, 1918, authority for use of assigned cars for railroad fuel was withdrawn, but the actual discontinuance was somewhat delayed pending some provision being made to take care of carriers' emergency needs when necessary. No change was made in the rule with respect to private cars. Effective October 10, 1918, the United States Railroad Administration promulgated a code of rules for rating tipple coal mines (other than anthracite) for car distribution purposes, known as Circular CS-31. Rules 6, 7, and 8, of that circular provided:

"6. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"7. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

"8. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

This code of rules was superseded, effective January 10, 1920, by Circular CS-31 (Revised) and rules 6, 7, and 8 became rules 8, 9, and 10, but contained no change in substance.

The essential change effected by these circulars from the rules laid down in the Hocking Valley and Traer cases was to withdraw the authority for the placement of railway-fuel cars on an assigned basis from the individual rail carrier and to lodge that power in the car-service section of the United States Railroad Administra-
1443 tion. No change was made in the counting requirements as announced in the Hocking Valley and Traer cases. When Circular CS-31 was promulgated there was no general car shortage, and the effect was not apparent. By the fall of 1918, there was a car surplus which continued until the summer of 1919, and in the meantime the fuel administration had discontinued operation. A car shortage developed in the late summer, and numerous railroads found themselves short of coal. The railroad administration took the position that if an operator had a contract for the loading of railroad fuel, he would have to load on that contract preferentially and without assigned cars, or the coal would be confiscated at the tipple before it was commercially billed. This practice continued until the fall of 1919. Then the central coal committee under the railroad administration began to function and continued until the termination of Federal control March 1, 1920. The central coal committee directed that cars for railroad fuel be placed in preference to cars for coal loading for other purposes. This was the status which existed at the time of the enactment of the transportation act, 1920, which, as we have seen, brought paragraph (12) into section 1 of the interstate commerce act, effective March 1, 1920.

On March 2, 1920, in a notice to carriers and shippers, we recommended that until experience and careful study demonstrated that other rules would be more effective and beneficial, and especially during the remainder of the early spring, the uniform rules as contained in the railroad administration's car-service section Circular CS-31 (Revised) be continued in effect. These rules made no provision for the assignment of cars for railroad fuel loading after the termination of Federal control. We had suggested that carriers and coal operators attempt to compose their differences with respect to the matter of the carriers' fuel supply, but conferences to that end were unavailing. The supply of cars available for the transportation of coal was insufficient to meet the demand and carriers resorted to wholesale confiscations in order to protect their fuel needs. Injunction proceedings brought against the practice of confiscation in at least one case resulted in a decree adverse to the carrier.

On April 15, 1920, in a further notice to carriers and shippers, we amended the recommendation in our notice to carriers and shippers of March 2, 1920, to read as follows:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Com-
1444 mission in R. R. Com. of Ohio et al. v. H. V. Ry. Co., 12 I. C. C. 398, and Traer v. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

Senate Resolution No. 376 was adopted May 24 (calendar day May 29), 1920. By it we were directed to inform the Senate upon what authority, if any, our order of April 15, 1920, entitled "Notice to Carriers and Shippers," was issued. In the preamble to the resolution the order of April 15, 1920, was set out in full. In our report in answer to that resolution, Assignment of Freight Cars, supra, on June 11, 1920, we reviewed our various decisions and those of the courts bearing on this question, and stated:

"The commission is of opinion that paragraph (12) of section 1 of the interstate commerce act does not change the rule of law laid down in the Hocking Valley and Traer cases, supra. The paragraph states in statutory form that which had theretofore been the law, pursuant to the decisions of the Commission and of the Supreme Court of the United States."

The language of paragraph (12) of section 1 has remained unchanged. Although our construction of the paragraph was specifically brought to the notice of the Senate, in response to a call for information as to the authority for the issuance of our order, and although our action in this regard was reported to both the Senate and House of Representatives in the annual report which by law we are required to make to the Congress, there has been no legislation in the three years which have elapsed to correct any error of interpretation upon our part. A bill declaring that paragraph (12) carried a rule of equal proportionate distribution of cars to coal mines, introduced in the Senate in the Sixty-seventh Congress, first session, was not reported out of committee.[1]

If the statute in question is at all doubtful in construction, the construction adopted by this administrative agency in its enforce-

[1] S. 2643, introduced June 6 (calendar day June 7), 1921. The bill sought to amend paragraph (12) of section 1 of the act, by adding the following:

Provided, That nothing contained in the foregoing subdivision shall authorize the commission at any time to suspend, modify, cancel, alter, or amend the provisions of subdivision 12 of this section which require equal proportionate distribution of cars to coal mines.

ment, followed for many years, without any attempt of Congress to change it, even when a bill for that purpose was long pending before it, and without any challenge of its correctness by any other department of the Government, while not controlling, is not to be disregarded without the most cogent and persuasive reasons. Robertson v. Downing, 127 U. S., 607.

During a period of acute car shortage in the summer of 1920 it developed that rule 8, as embodied in our notice of April 15, 1920, had been and was being applied by particular carriers in a manner inconsistent with and contrary to the principles applicable in
1445 the Hocking Valley and Traer cases, and that uncertainty and undue preference and prejudice resulted. Accordingly, on September 28, 1920, we issued service order No. 18, effective October 1, 1920, and reissued the rules laid down in our order of April 15, 1920, with the following proviso:

"Provided, That common carriers by railroad may not assign cars for their own fuel and fail to count such cars against the mine's distributive share unless the entire output of such mine is taken by such a carrier for a period of not less than six consecutive months."

This order remained in force until March 24, 1921, when it was canceled, as the emergency which had called it into effect had been measurably relieved. The investigation here under consideration was instituted simultaneously with the order of vacation.

The National Coal Association, protestant herein, contends that the first sentence of paragraph (12) is a broad requirement that every carrier shall make just and reasonable distribution of cars among mines at all times, whether there be a car shortage or car surplus; that the duty of establishing rules which will effectuate such just and reasonable distribution is left with the carrier in the first instance, subject to review by us under the provisions of section 15. It is not disputed—in fact, it is contended—that under this sentence we would have ample power to prescribe the same rules as we did in the Hocking Valley and Traer cases. But that association contends that in the second sentence it is specifically provided that during any period when the supply of cars does not equal the requirements of the mines, it shall be the duty of the carrier to maintain and apply just and reasonable mine ratings, and to count each and every car furnished to or used by a mine for transportation of coal against the mine. The two provisions taken together, the application of ratings and the counting of every car, it is contended, require that during periods of car shortage available cars must be distributed in exact mathematical proportion to mine ratings. It is insisted that the words "to count each and every car furnished to or used by any such mine for transportation of coal against the mine" do not have the restricted meaning attributed to them by respondents. It is argued that the counting requirement of the Traer and Hocking Valley rule did not mean a mere enumeration of cars for the purpose of ascertaining whether the mine receiving

them may have additional commercial cars, but did mean that all cars shall be exactly prorated in accordance with ratings. This is so because in every case where the Traer rule was discussed or announced there was attached to the counting requirement a qualification that all assigned cars shall nevertheless be delivered to the mines to which assigned or consigned, plainly indicating that an unqualified counting requirement would have called for a pro rata distribution.

1446 The respondents place themselves behind the position that paragraph (12) does not change the rule in the Hocking Valley and Traer cases, taken by us in our report to the Senate, Assignment of Freight Cars, supra. They do not find it necessary to give the words "and to count each and every car used for transportation of coal against the mine" a meaning that all cars shall be prorated, whether assigned or unassigned. They find a purpose on the part of Congress in importing these words into the act, of adding a legislative mandate and to give permanency to a rule which had theretofore been an administrative determination, made upon the facts as appearing of record in particular cases, and therefore subject to change by the same administrative tribunal as its ideas of policy might vary or as the record in particular cases might require. Our well-known practice has been to regard such determinations as made only upon the facts and under the conditions presented in the particular record. It was clearly within the power of Congress to apply at their convenience the rule, which, as is apparent from what has preceded, was a limitation upon a practice of the carriers long existing, which the carriers had claimed the right to perpetuate, and as against the perpetuation of which there stood merely an administrative finding of fact based upon facts as disclosed in records made some 13 years before, binding upon but a few out of the hundreds of railroads subject to the act. Up to the time of the enactment of the transportation act, 1920, our findings as embraced in the Hocking Valley and Traer cases had been bottomed upon the fact of discrimination, and we had not attempted to prescribe a rule as reasonable. We had no occasion to pass upon that question after the car-service amendment of 1917 was enacted[1] until the close of Federal control. It might well be that Congress found the rule to be reasonable, as well as nondiscriminatory, and that it intended to settle the policy that such cars must be counted against the distributive share, as that phrase was then understood, and to prohibit the placement of additional cars at mines for commercial loading if the assigned cars placed equaled or exceeded the pro rata share. The construction placed upon paragraph (12) as stated in our report to Congress is entirely consistent with this view.

We may briefly examine the legislative history of the provision in question. A comprehensive bill (S. 3288), intended to make amend-

[1] An act to amend an act entitled "An act to regulate commerce," as amended, in respect of car service, and for other purposes, approved May 29, 1917.

ments to the act to regulate commerce necessitated by the imminent return of the railroads from Federal control to their owners, undertook to prohibit the assigned-car practice in precise and detailed terms. (Section 34, page 76, of the bill as amended and agreed
1447 to by the Senate.) This bill in this respect had been strongly advocated by the National Coal Association, except that the association did not approve a proviso which would have given power to the proposed transportation board to assign railway-fuel cars. The association thereupon suggested to the chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, then considering H. R. 4378, that the committee incorporate amendments to carry into the House bill the provisions of section 34 of the Senate bill, with the exception of the proviso mentioned. The substitute proposed was presented to the committee of the House by counsel for the association. (Hearings upon H. R. 4378, pages 2172–2191.) Subsequently the House committee called before it Commissioner Clark, then chairman of this commission. A portion of the examination of our chairman by the chairman of the House committee appears in the margin.[1]

The bill as reported to the House did not contain the amendments suggested by the coal association, but did contain the precise language contained in the first two sentences of paragraph (12), as heretofore quoted. In Report No. 456 to the House of Representatives on bill H. R. 10453, which became the transportation act, 1920, the committee said:

* * * "Originally the the term 'car service' included 'the movement, distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include 'the supply, movement, and operation of trains by any carrier by railroad subject to this act,' and so require every carrier by railroad 'to furnish safe and adequate
1448 car service.' In a recent decision of the Supreme Court of the United States it was held that under the commerce act the

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[1] The CHAIRMAN. Mr. Clark, are you familiar with the provision inserted in the Cummins bill with reference to coal-car distribution? They have a section devoted to it.

Mr. CLARK. I remember there is such a section, but at the instant I do not recall the particular provision.

The CHAIRMAN. It seeks to carry into the law the orders of the director general now with reference to car distribution.

Mr. CLARK. That leads me to say that in the earlier days of the Railroad Administration this very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers own fuel supply came up. Some members of the director general's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. My understanding is that the rule adopted was based upon the principles laid down by us, and that they are following the practice of counting those cars against the distributive shares of the mines.

The CHAIRMAN. You would be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation?

Mr. CLARK. I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The CHAIRMAN. The idea expressed by the representative of the coal association was that when Federal control ended there might be a recurrence to the old practice.

Mr. CLARK. Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I can not see any possible objection to carrying it into the statute.

commission does not have the authority to order a common carrier to supply itself with certain cars. The pending bill gives the commission such authority.

"The same section makes it the duty of every common carrier, or railroad, 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' During Federal control such a rule has been followed by the Director General and the committee follows the decisions of the Interstate Commerce Commission and the present practice and has put in form of law what had been enunciated as proper practice. (Report No. 456, page 17, 66th Cong., 1st sess.)

"Paragraph (12) of the amended section incorporates in the statute a rule laid down by the commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, thus avoiding any possibility of the recurrence of the evil of what is known as 'assigned cars.'" (Report No. 456, page 27, 66th Cong., 1st sess.)

The only rule which had been laid down by the commission as to just and reasonable distribution of coal cars among the mines and upheld by the Supreme Court was that stated in the Traer and Hocking Valley cases, sustained in the Illinois Central and Alton cases, supra.

The Senate bill, which contained the amendments suggested by the protestant association, and the House bill which had not incorporated the amendments that association had suggested, went to conference. The conferees adopted the provisions of the House bill in this respect.

It is claimed that the chairman of the House committee and the chairman of this commission were "obviously at cross purposes" in their discussion, and that the chairman of the commission was in error in his understanding that the rule adopted by the director general's staff was based upon the principles laid down by the commission. Our chairman, however, was warranted in his statement by the provisions of Circular CS-31, Revised, already quoted, although the designation of cars to be assigned was made by the car-service section of the United States Railroad Administration, instead of by the particular carrier as previous to Federal control. This minor distinction in nowise impairs the general accuracy of the statement made by our chairman.

The words used in the second sentence of paragraph (12) "to count each and every car furnished to or used by any such mine for transportation of coal against the mine" were not new in this con-

nection, but substantially the same words had been used in the
1449 Hocking Valley, Traer, and Hillsdale cases, supra, and in Royal Coal & Coke Co. v. S. Ry. Co., 13 I. C. C., 440, 449, and in some of the court decisions. In none of those cases was it found necessary to give the words quoted the meaning of equivalency to pro rata distribution, or as inconsistent with the practice which followed our decisions in those cases. In fact, in the Hillsdale case, we held that "all such (assigned) cars must be counted against the distributive share of the mine receiving them" (19 I. C. C., 364), and virtually substantial language was employed in the mandatory clauses of our order in that case. The words also had a widespread usage in railroad and traffic circles at the time of the enactment of the transportation act, and that usage was consistent with that expressed by us in our report to the Senate, supra. While, in the expression of the rule which originated in the Hocking Valley and Traer cases, the words "count against the mine" were continually being applied as a necessary term in the formula, it was always recognized that the rule with these words in it was not the equivalent of a requirement for equal proportionate distribution of cars assigned and unassigned, to coal mines. With this usage Congress was no doubt familiar, as we are.

The question here presented has been passed upon by the Federal courts in three cases. In Corona Coal Co. v. Southern Ry. Co., 266 Fed., 726, and in Cleveland & Western Coal Co. v. B. & O. R. Co., 283 Fed., 993, the District Courts of the United States for the Northern District of Alabama and Northern District of Ohio, respectively, expressed the opinion that the intent of Congress was to put into statutory form the rule theretofore expressed in the Hocking Valley and Traer cases. A contrary view was expressed by the Circuit Court of Appeals in the Fourth Circuit, in B. & O. R. R. Co. v. Lambert Run Coal Company, 267 Fed., 776, reversing on this point the District Court of the United States for the Northern District of West Virginia, which had found upon this point in consonance with the Corona case. But the Circuit Court of Appeals was itself reversed as having no jurisdiction in the premises. Lambert Run Coal Co. v. B. & O. R. R. Co., 258 U. S., 377. While giving to the opinions of the Circuit Court of Appeals all the respect due to the deliberate findings of such a judicial tribunal, its determination of a question of law, made in a proceeding where no jurisdiction vested, and where the Government as a necessary party was absent, and was not heard upon the construction of the statute, can not be accorded weight as determinative of this issue.

We therefore conclude that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act.

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II

Although the rules proposed for application during future periods of car shortage may not in terms be forbidden by law, we must de-

termine whether in fact they are just and reasonable, as required by section 1, and whether they result in undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage in any respect whatsoever, forbidden by section 3 of the act. These questions may be considered together. First we will deal with the assigned car for railroad fuel, system and foreign line. At the outset we are led to repeat that we must deal with questions of this character upon the basis of the record as now developed. The decisions previously cited have left intact these questions as they are presented to us in the light of present-day facts.

Certain premises meet general acceptance in this record. It is recognized that the importance of the railroads in the distribution of coal and other commodities, and their general dependence upon bituminous coal in producing transportation, require that in some lawful way they may be assured of a steady supply of suitable coal. It is likewise generally admitted that, whatever means are adopted to secure such supply, emergencies will occur when the supply will fail unless the railroad is enabled by some means within the law to take sufficient coal ahead of less necessitous uses to keep the flow of traffic going as the public interest requires. There is no dissent from the proposition that confiscation of fuel coal by railroads is a practice to be avoided. It seems to be generally accepted that the public interest requires that the carriers shall not be subjected to unreasonable prices. Obviously the carrier should not be permitted to take advantage of a means provided by the public to insure an uninterrupted movement of traffic, as a means to coerce an unreasonably low price for fuel.

There is enough bituminous coal in the ground in this country to more than supply the demands of all consumers for a long period. There are more than enough miners to produce coal for all purposes. There are more mines than is consistent with the most efficient use of equipment, and their aggregate capacity exceeds greatly the country's demand. The demands for coal are seasonal, and as a result we have frequent seasonal or local car shortages. In 1916, when we began to feel the effect of the war in Europe, we experienced widespread car shortages, resulting in an investigation by us on our own motion. Car Supply Investigation, 42 I. C. C. 657. The more recent general coal-car shortages and the steps taken to insure to carriers their fuel needs have already been adverted to. The aggregate time lost because of car shortages, local and general, is a considerable proportion of the whole of any recent elapsed period of time.
1451 And during each period of car shortage the practical problem of supplying the railroads with fuel has been presented sharply, and the meeting of the problem has been most troublesome, and has necessarily involved considerable general disturbance of production and transportation. The large proportionate demand for bituminous coal made by the railroads—nearly 28 per cent of the total consumed and exported by the United States annually—adds to the difficulty of the situation.

The means employed by the railroads in securing coal for fuel purposes vary widely. Some carriers own mines from which they secure a large portion of their requirements; others contract for the entire output of certain mines for a definite period of time; and still others contract for a partial output on a day-to-day basis. Some secure their coal supply by the use of the assigned cars under the rules in the Hocking Valley and Traer cases, and others secure their fuel without assigned cars. According to the record, on October 1, 1922, the following Class I carriers and bituminous coal loading railroads not included in Class I were securing their fuel supply without the use of assigned cars: Arizona & Eastern; Atchison, Topeka & Santa Fe; Atlanta, Birmingham & Atlantic; Atlantic Coast Line; Beverly & Southern; Boston & Albany*; Buffalo, Rochester & Pittsburgh*; Carolina, Clinchfield & Ohio*; Cambria & Indiana; Charleston & Western Carolina; Chicago & Illinois Midland; Cincinnati, Indianapolis & Western*; Chicago & North Western; Chicago, St. Paul, Minneapolis & Omaha; Colorado Northern; Cumberland; Delaware, Lackawanna & Western*; Duluth, Missabe & Northern; Detroit & Mackinac; Duluth, South Shore & Atlantic; Elgin, Joliet & Eastern*; El Paso & Southwestern; Fort Dodge, Des Moines & Southern; Georgia & Florida*; Great Northern; Green Bay & Western; Huntingdon & Broad Top Mountain; Lake Erie, Franklin & Clarion; Lehigh & Hudson River; Louisiana Railway & Navigation; Lehigh & New England*; Lehigh Valley*; Litchfield & Madison; Maine Central; Minneapolis & St. Louis; Mississippi Central; Mobile & Ohio; Monongahela*; Montour; New York, Ontario & Western; Pittsburg, Shawmut & Northern; Richmond, Fredericksburg & Potomac*; St. Louis-San Francisco; Staten Island Rapid Transit; Seaboard Air Line; Tennessee Central; Toledo, Peoria & Western; Union Pacific; Union; Utah; Western Maryland*; Montana, Wyoming & Southern.

The carriers indicated by an asterisk employed assigned cars in securing their fuel during the 1920 shortage.

1452 Certain of these carriers, notably the Union Pacific, Great Northern, Chicago & North Western, Minneapolis & St. Louis, and Atchison, Topeka & Santa Fe, own mines from which they secure a considerable portion of their fuel. It will be helpful to state briefly as illustrative the practices of certain of the larger carriers which employ assigned cars in securing their fuel and the justification they present.

The Illinois Central secured by means of assigned cars from 60 to 75 per cent of its fuel requirements from the Madison Coal Corporation, of which it owns all of the stock. This coal corporation owns eight mines in southern Illinois on the St. Louis division of the Illinois Central and does not engage in commercial business. The balance of the carrier's fuel is secured by seasonal contracts of 30 days, or as needed during periods of car surplus. The president of the railroad company testified that the assigned cars were essential for the following reasons: (1) They gave the carriers a regular and certain supply of coal in times of car shortage. (2) The coals

from different fields are not of the same grade, which requires that certain adjustments be made in the locomotives. The Alabama coal is a different grade from that mined in southern Illinois, and again, the coal in different counties in Illinois has different burning qualities. (3) Unless the carriers can contract for a regular and suitable supply of coal, resort to confiscation becomes necessary. (4) Going into the spot market would increase the price of coal not only to the carrier but to the consuming public as well. This carrier burns about 5,000,000 tons of coal per year, or from 250 to 320 carloads per day, and usually has on hand about 20 days' supply. During the winter it undertakes to store from 30 to 45 days' supply.

The Chicago Great Western owns a mine on the lines of the Illinois Central and has provided itself with hopper-bottom cars which are assigned to the mines to take care of its fuel needs. This road has facilities for unloading the cars into receptacles that elevate the coal for direct delivery to the engines.

The Pere Marquette consumes approximately 900,000 tons of coal per year, or from 45 to 60 carloads per day, secured largely from mines in eastern Ohio, Kentucky, West Virginia, and Pennsylvania. It solicits bids from about 500 coal producers. These bids are all on a standard specification, and contracts are made with a few operators whose offer is most advantageous, considering quality as well as price. Some three or four years ago it purchased 1,000 all-steel hopper-bottom self-clearing coal cars expressly to take care of its fuel requirements. It has installed modern fuel stations at all the large terminals to enable the economic use of self-dumping
1453 cars and avoid the necessary expense of shoveling the coal. The coal is dumped into either an elevated trestle or a hopper. During the summer months it stores about 100,000 tons, or about one month's supply, to take care of its needs during the extreme winter weather. In 1921 it stored about 130,000 tons, or six weeks' supply. It estimates the cost of storing and picking up the coal at 70 cents per ton.

The position of the New England carriers is practically the same. They have no sources of fuel on their own rails and are dependent upon mines in Pennsylvania and West Virginia located on the lines of other carriers. The New England carriers normally consume about 6,000,000 tons of coal per year. During the year 1920, due to abnormal market and transportation conditions, the New York, New Haven & Hartford bought large amounts of spot coal at high prices. Its fuel that year cost $45,700,000, equivalent to approximately 28.1 per cent of the transportation costs. In 1921 its fuel bill amounted to $23,500,000, or approximately 25.7 per cent of transportation costs. The New Haven customarily covers its requirements by contracts for the coal year. Its contracts are based on quality, prospects for regularity in supply, and price. The New England carriers have found it necessary to lay in a seasonal supply of fuel for protection against irregularity in mine loading as well as slowing up of transportation.

They have facilities for seasonal storage of an aggregate capacity of 1,200,000 tons. The usual seasonal storage is approximately 800,000 tons, or 13 per cent of their normal requirements. They have extensive facilities for seasonal storage, including yards with parallel tracks for ground storage, similar yards with trestles for dumping, bins and overhead movable cranes, facilities in connection with tidewater discharge plants and, where the winter is more severe, large covered bins. The cost of storage is estimated at from 50 to 60 cents per ton.

About 55 per cent of the New Haven's coal is delivered direct to locomotive tenders through mechanical coaling stations at the more important terminals, which have storage capacity for several days. About 28 per cent is delivered by locomotive cranes at the less important terminals. The remainder, 17 per cent, is delivered through outlying points where locomotives lay out and where consumption does not justify either facility. The coaling points on the New Haven average one to every 29 miles, and on the Boston & Maine one to every 37 miles. These different conditions of unloading compel the movement of the proper type of car to each destination.

The assigned car, the New Haven claims, enables it to secure a uniform quality and grade suitable for its requirements and favorable to good service; permits the placing of contracts for yearly
1454 consumption at reasonable prices; requires the use of a minimum number of cars on consuming line in its fuel service, results in an increase in the number of cars available for commercial loading; reduces unloading costs, as the unloading facilities and types of cars are each adapted to the other; affords a greater opportunity for solid train movement of empties and loads; and affords a better standard of maintenance and equipment on account of system cars being more regularly at home. The New Haven claims that a railroad attempting to procure its fuel supply without the use of assigned cars is under serious disadvantages, which we will summarize. Overcontracting for fuel is required to safeguard against irregular supply; an excessive supply of coaling cars must be held with resulting heavy increase in per diem to consuming road; excessive switching costs to both originating and consuming lines are incurred in selecting proper types of equipment for railroad fuel; the unloading costs on the consuming line are excessive on account of different types of cars; greater unloading storage must be provided to meet seasonal requirements entailing higher handling costs; and the purchase of spot coal at higher prices or the confiscation of commercial coal or fuel coal consigned to another carrier is inevitable.

The New England carriers do not use assigned cars to secure their entire fuel-coal supply. Seemingly, in the absence of an order from us specifically authorizing the practice, they secure their fuel supply without assigned cars. Some of their coal moves by way of tidewater, and assigned cars are not placed at the mines for the loading of such coal.

The Baltimore & Ohio consumes from six to seven million tons of coal annually. During the four years preceding 1922 the coal consumed averaged 17 per cent of the total production on its line. It contracts for its fuel supply with 44 operators, covering the entire output of 56 mines with an estimated daily tonnage of 23,438 tons. The large majority of these mines are located on the heaviest coal-producing divisions of the road. Approximately 14 per cent of the coal consumed is delivered direct into the tenders of the engines. There are 17 divisions, with an average of five coaling stations to a division. The carrier owns 635 stoker-fired engines, 442 of which require a specially-prepared coal, otherwise two firemen are necessary. A plan has been worked out through the use of the assigned car whereby coal produced in a certain territory will go to the same divisions continuously, and this, it is urged, results in increased efficiency. Any change in the assignment of coal lowers the efficiency of the motive power. With the assigned car the Baltimore & Ohio used an average of about two grades of coal on a division. During the strike period in 1922 it was necessary to use about
1455 18 to 20 different grades, and the performance of the motive power was unsatisfactory. Several hundred thousand tons were stored when the car supply permitted without interference with or affecting the commercial distribution. The Baltimore & Ohio would encourage the storing of coal if the car supply is strong enough.

The Chesapeake & Ohio consumes about 2,500,000 tons of coal annually, of which approximately 500,000 tons are loaded direct on the engine tenders and 2,200,000 tons on cars. This carrier owns mines which supply 700,000 tons, and 1,500,000 tons are obtained under three-year contracts from seven different mines. High-volatile steam coal is used practically exclusively. Coal elevators of modern type are maintained at various locomotive terminals. No coal is stored, other than the small storage capacity of the bins and coal elevators, the largest of which is 300 tons. The carrier estimates that 1,400 out of a total of 42,000 coal cars owned will be constantly required for securing its fuel, although prompt dumping reduces the number of cars held daily to approximately 1,200. Contracts are confined to a few mines which produce coal efficient for engine purposes. It is contended that if the contracts were spread over a number of mines an unduly large number of cars would be required to handle the fuel contracted for; the cost of assembling would be excessive; it would interfere with transportation functions; the responsibility for filling the requirements would be divided among too many people; and it would be practically impossible for the carrier to make an inspection of the coal.

There are no mines on the Grand Trunk from which it can obtain fuel, and it is dependent upon coal produced in the United States. To insure a supply of proper grade the Grand Trunk purchased 5,456 hopper-bottom self-clearing cars at a cost of $4,320,000. With the exception of 350 or 400, these are used largely for transporting

its coal. Its requirements approximate 7,000 tons daily, or a little over 2,500,000 tons annually. The coal is obtained largely from its own three mines near Bellaire, Ohio, one on the Baltimore & Ohio and two on the Pennsylvania. About 10 to 15 per cent of its supply is secured from mines in Nova Scotia, which is used at Montreal and points east. It has a contract with a mine on the Illinois Central in Illinois, and furnishes about 25 to 30 cars a day to the Illinois Central at Chicago for delivery at that mine. It has short-term contracts with other mines on the Buffalo, Rochester & Pittsburgh; Buffalo & Susquehanna; and Pittsburg, Shawmut & Northern. Some of this coal is of poor quality, and equipment is not assigned for the loading thereof except to one mine on the Buffalo, Rochester & Pittsburgh, with which a yearly contract is made. It generally stores about 150,000 to 600,000 tons, about 90 days' supply, 1456 to guard against any slow-up in transportation caused by storm or congestion. The position of the Grand Trunk is similar to that of other lines, that if it could not assign cars for its fuel it would be forced into the open market to purchase coal at an increased price, with no assurance of a steady movement of the supply.

The Chicago, Burlington & Quincy owns a mine in the southern Illinois district with a production of 4,200 to 4,500 tons per day. It consumes, on an average, about 13,500 tons per day. It contracts with other mines for the remainder of its coal. During slack periods, or when requirements are less, its own mine is closed down because the contract mines meet its requirements. It makes a general practice of storing a limited quantity, but regards it as uneconomical to store more than a reasonable amount. The estimated handling cost is about 25 cents per ton.

There is only one small mine on the Seaboard Air Line, and it obtains its coal from mines on other lines. It consumes about 103,000 tons monthly, about 40 per cent of which is obtained from mines in West Virginia Virginia territory on the Norfolk & Western, Interstate, and Southern Railways, and 60 per cent from Alabama mines on the Frisco and Birmingham Belt. Its requirements are secured through part-output contracts made early in the spring for the year's supply beginning July 1. Since Federal control the greater portion of its coal has been secured without the use of assigned cars. Prior to Federal control it was the practice to assign coal cars to protect at least 75 per cent and at times 100 per cent of its requirements. It maintains seven operating divisions, with 23 major coaling stations, in addition to 45 smaller stations. Storage is provided at five points for approximately 100,000 tons, or one month's supply. The coal is either dumped directly on the ground or from a trestle.

The Southern under normal conditions obtains its supply under contracts covering the entire output from mines on its line in Virginia, Tennessee, Kentucky, Alabama, Indiana, and Illinois. It occasionally purchases coal for the Washington division from mines

in West Virginia on the Chesapeake & Ohio and Baltimore & Ohio. It estimates its requirements for the year ending January 30, 1923, as 5,871,522 tons. It endeavors to keep on hand a supply for about 20 days.

Some of the important carriers which use the assigned car for railway fuel at mines on their own lines have not presented any statement of the reasons which have impelled them to adopt or maintain the practice. Among such carriers may be mentioned the Pennsylvania, New York Central, and Louisville & Nashville.

1457 Many of the important carriers which supply cars to coal-loading railways for assignment to mines located thereon have not submitted any statement as to their particular situations.

The position of the opponents of the assigned car for railway fuel may briefly be summarized as follows: (1) The practice reduces the car supply at commercial mines on certain divisions, since the assigned cars are taken into account in determining the number of cars to which each division as a whole is entitled; (2) it results in a wastage of cars, because a mine loading assigned cars usually has more cars standing over than a mine loading commercial coal; (3) it produces great and harmful inequalities in working time in near-by competing mines; and (4) it affects the price of the coal purchased by the carriers injuriously to the mine operators, and that it results in the shipper buying transportation preference with coal, and the carrier buying coal with transportation preference. These contentions will be dealt with separately.

The effect of the use of the assigned car for railway fuel is to diminish to some extent the supply of cars placed at commercial mines during periods of car shortage. The extent to which the practice causes a diminution in supply is in dispute; the mine operators opposing the practice consider it a serious matter, both because of its direct effect in limiting production, and because of the indirect effects upon their costs and labor supply, while the carriers minimize the result and even claim compensating advantages to the commercial mines because of the practice. Because of wide differences in the practices of the railroads, and the many fluctuations due to changes in car supply, public clamor for coal, or service orders of the commission, it is extremely difficult to state in precise terms as to a division of a particular line what would have been the effect on the distribution of cars to commercial mines had no cars been assigned; and it is even more difficult to express in any arithmetical manner the result as to the carriers generally. There is much in the record on this subject, which must be weighed in the view of countervailing considerations. The estimates based on individual judgment in some instances indicate the increase in the commercial distribution would have been almost 40 per cent, at the height of the car shortage of 1922. Other testimony indicates a difference of from 10 to 30 per cent. Evidently the private assigned car figures in these estimates, as well as the railway fuel cars. The last column

of the following table indicates the increased supply which commercial mines in the various districts on the Chesapeake & Ohio Railway would have received during the year 1920, if there had been a pro rata distribution of all cars, i. e., commercial, system fuel, foreign fuel, and private.

Item	New River district	Kanawha district	Coal River district	Logan district	Kentucky district	Total
Unassigned cars placed, per cent of aggregate orders	Per cent 50.4	Per cent 56.9	Per cent 51.5	Per cent 55.9	Per cent 56.1	Per cent 54.1
Per cent of aggregate orders if all cars prorated	56.7	58.6	55.9	58.8	58.6	58.3
Increase in cars placed, if all prorated, per cent of aggregate orders	6.3	5.7	4.4	2.9	2.5	4.2

In times of shortage, with a strong demand for coal, the orders may be taken as approximating the mine ratings. The percentages now to be quoted are in terms of the aggregate orders. During this same period, on an order for 26,429.1 cars, 25,589.7 cars were assigned for development of new mines, or under service order No. 9 of this commission. If these assignments had not been made, the percentage of unassigned cars placed would have increased from 51.1 to 52.3 of the orders. If the assignment for railway-fuel and private cars had been abolished, and those cars prorated, the percentage would have further increased to 56. Without private-car assignments, had the private cars remained off the line, the percentage would have decreased from 51.1 to 48.5. If no assignments for railway fuel or of private cars had been made, the former class of cars being prorated to all mines and the latter being no longer on the line, the percentage would have decreased from 51.1 to 50.1. If the assignment for railway fuel had been abolished and the railway-fuel cars prorated to all mines, the percentage would have increased from 51.1 to 52.7.

The weakness of such a showing is that the orders by mines in times of shortage, taken as the base to which each of the percentages stated apply, which approximate the mine ratings, are notoriously far greater than the normal mine capacities, or the ability of the carrier to transport, or the country to consume bituminous coal, when taken in the aggregate. The ratings are merely the factors to be used in determining the relative car supply each mine is to receive, in times of shortage, whether the supply be 10 per cent or 90 per cent of the ratings. More significant would be a comparison of the number of cars which would be placed if all assigned cars were added to those distributed with the number in fact apportioned among the commercial mines. If the second line of percentages shown in the table above be compared with the first line, it will appear that the result of prorating the assigned cars (including private cars as well as those for railroad fuel) with the unassigned would have
1459 been to increase the supply of the commercial mines over the cars actually furnished by the following percentages of the cars in fact set:

New River district	12.5 per cent.
Kanawha district	11.2 per cent.
Coal River district	8.5 per cent.
Logan district	7.5 per cent.
Kentucky district	8.6 per cent.
Total	9.6 per cent.

In considering these averages it is to be remembered that the figures cover a calendar year, during a part of which there was no car shortage. As previously explained, cars for railroad fuel were assigned by order of the United States Railroad Administration during Federal control; from March 1 to April 15, when our notice to carriers and shippers became effective, the effective car-service rules made no provision for the assignment of railroad-fuel cars. If confined to a period of time during which a car shortage prevailed, and during which the assigned-car practice was applied throughout, the percentage of increase in the supply to the commercial mines which would result from the abolition of the assigned-car practice would be greater than shown in the last preceding table. Further, as the statement covers entire fields, aggregated into single sets of comparative figures, the effect on different individuals doubtless varied. With some, the result of the change in method of apportionment of the assigned cars might be inconsiderable, but of greater importance to others than the mere statement of percentages might imply. The mines which receive a full car supply through the assignment practice are few in number as compared with the commercial mines, and the latter operate at but a fraction of their capacity. Therefore the disparity in treatment between individuals is far greater than is indicated by the process of recasting the supply in the manner indicated. The prorating of all cars equally would decrease the supply given the few mines much more in proportion than it would increase the supply of the remainder. But, if a preference exists, the fact that few receive it and that its abolition would not intrinsically greatly increase the benefits to the unfavored great majority of shippers, can not be urged as a justification.

A compilation based upon estimates made by the Baltimore & Ohio for four successive Thursdays in October, 1922, is to the effect that the commercial supply would have been increased by the following percentages of the cars placed at commercial mines, if system-fuel cars had been distributed ratably with unassigned cars.[1]

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[1] The reduction in car capacity for the Cumberland division October 12 and 19, which would result if all cars had been pooled, is thus accounted for: The adjusted mine rating for assigned cars slightly exceeded the adjusted mine rating for unassigned cars. On the dates mentioned no assigned cars were placed on the Cumberland division. Dividing the number of cars placed, which were all on the unassigned basis, by the greater divisor gives a smaller number of cars as due the commercial mines, and brings about a nominal reduction in the cars to be allotted to them. The same method of computation was employed as to the other divisions shown.

Division	Oct. 5, 1922	Oct. 12, 1922	Oct. 19, 1922	Oct. 26, 1922
	Per cent	*Per cent*	*Per cent*	*Per cent*
Monongah	55.9	11.1	27.1	65.9
Connellsville	6.8	2.9	8.0	6.4
Wheeling	75.9	3.2	44.9	60.7
Cumberland	2.7	−1.4	−1.3	2.4
Pittsburgh	3.1	48.1	2.8	36.3
Charleston	5.9	3.4	13.8	7.3
St. Louis	3.0	18.6	12.9	5.4

No changes would have been made in the distribution in the Ohio River, Ohio, Toledo, Akron, and Newark divisions, as seemingly no cars were assigned in those divisions.

Evidence of bona fide contracts for the output of the mines is required by the Baltimore & Ohio before assigned cars for foreign fuel can be sent in. Approximately 25 per cent of the total cars loaded on the Baltimore & Ohio are assigned cars. On Mondays in October, 1922, had assigned cars for Baltimore & Ohio fuel been eliminated the distribution to commercial mines would have been increased to any extent on four divisions only. The increases on the system as a whole ranged from 3.23 per cent to 4.6 per cent of the mine ratings. Assuming that the average tipple mine has a rating of 10 cars per day, and that the available cars had been equally distributed, the result would have been a daily increase in the car supply at the commercial mine of approximately 0.4 car, or about 10 cars a month. The weight to be given this showing is discounted by reason of the fact that Monday is practically always the day of best car supply on any carrier during times of shortage, and the day on which the effect of the assigned car upon the commercial mine would be at the minimum. But, in view of the inability of the commercial mine operator in such times to meet the demands for coal, the diversion of an average of a fraction of a car daily is not to be waived aside because it may seem inconsiderable as compared with an average rating of 10 cars, assumed for the illustration. In fact, with but a 40 per cent car supply, the operator in the case assumed would receive but four cars a day on an average, and an increase of four-tenths of one car would be equivalent to in-
1461 creasing the car supply he receives 10 per cent, and would permit him to increase his output and supply one-tenth more coal to his customers.

If a foreign carrier were not permitted to assign its own cars to a coal-loading carrier, the latter would be under the primary duty of supplying cars at the mines. There would follow a reduction in the supply available for the commercial mines, because of the necessity for spreading the cars that were at hand over a wider field, unless the foreign carriers were compelled to participate in furnishing coal cars for the service. For that reason the carriers claim that such cars are a distinct advantage to the commercial operator. Whether this would ultimately be the fact must depend upon the determina-

tion of the duty of the participants in the through movement to supply appropriate shares of equipment necessary for the transportation. Without passing on the question whether the duty rests upon the carriers jointly (compare Huerfano Coal Co. v. C. & S. E. R. R. Co., 28 I. C. C. 502) or severally, in the aggregate the duty of providing an adequate supply of equipment rests upon the railroad carriers.

When a railroad company becomes a purchaser of coal upon the lines of a connection, and ships it to itself as consignee, it is entitled to the same consideration as any commercial shipper or consignee and no more, and this is true when the shipment moves partly over the rails of the carrier that is in fact the shipper or consignee. Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1, 9; Divisions of Joint Rates on Railway Fuel Coal, 37 I. C. C. 265.

There is evidence which indicates that the assignment of cars for foreign-line fuel coal to a certain extent dislocates the car supply of the coal-loading line to the injury of the operator shipping commercial coal, because of the frequent disregard of the requirement that cars of one line sent to another line for fuel must be placed at the mines to which they are carded. Some coal-loading roads place such foreign-line fuel cars at the mines nearest the junction point at which received, and then place system cars at the mines which are to ship coal to the foreign line. This usually occurs when the home line is congested. The result is a material lessening of the already short car supply of the home line, as the car-service rules require that the foreign-line cars must be loaded to or in the home direction, and an equal number of system cars go to the foreign line with its fuel. Assigned foreign-line fuel cars sometimes replace an equal number of commercial cars which would otherwise be subject to pro rata distribution. The coal-loading road equalizes its car supply among divisions, and in doing so takes into account the foreign-line fuel cars. This is detrimental to the commercial operators, since it reduces the number of cars to which they would otherwise be entitled.

1462 The record indicates that upon the whole the wastage during periods of shortage, which results from cars set not being loaded on that day but held over, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. A scanty or irregular supply of cars to the commercial mine makes for sporadic production, while the mine with the assigned cars flowing more steadily and closer to capacity is better able to utilize with promptness the equipment received. If the commercial mine has cars left over, unloaded, they are charged as against the subsequent supply, and the commercial operator goes to every length to avoid this in times of shortage, when the price obtainable for his product is usually the highest. The assigned-car mine is under less disability in this regard, and is not subject to the same penalty, because its failure to load promptly does not decrease its future sup-

ply of assigned cars. While the difference in percentage between the two classes is not great, evidently in the aggregate some thousands of cars are involved daily in periods of shortage.

All interests represented take the position that the bituminous coal-mining industry is greatly overdeveloped, and that there is a surplus of labor available for such mines. In times of plentiful car supply, or when the demand for bituminous coal is low, many small or weak mines, which are the least economical to operate, are forced to close. Car shortages are usually accompanied by a condition of alarm on the part of the consuming public, and a demand for the coal which becomes more excited as the coal-car supply lessens. This encourages the opening of the smaller and weaker mines with the recurrence of a poor car supply, and the paradox is presented that as the car supply becomes worse, the capacity of the open mines increases at even a greater rate. This makes more difficult the process of distribution as the cars in service can not be handled as efficiently, nor can as much coal be transported in the aggregate as if fewer mines were demanding service. The increase in demand and mine rating must be met by a pro rata distribution of the available cars, and thus the supply, already diminished because of the lesser efficiency possible in movement, is further diluted in the process of ratable distribution according to the enlarged capacity. The consequence is that in times of car shortage the commercial operators are in the keenest competition for cars. There is also a competition in the demand for cars as between users of coal. The service orders which we issued in 1920 and 1922 were based upon the insufficiency of the existing supply to meet all needs. Industries which were less vital to the public welfare, but better enabled to pass along their fuel costs, were able to bid up the price of coal for all users, and thus attracted an undue proportion from
1463 the more essential uses, to the detriment of the convenience of the public and the commerce of the people. A shortened car supply at commercial mines, from whatever cause, tends in this direction.

Respondents have interpreted our decisions as permitting the assignment of cars on a day-to-day basis. Thus, on a given day a mine with a rated capacity of 20 cars loads railroad fuel, and receives 20 assigned cars, while another mine with the same rated capacity loading commercial coal is supplied but a percentage of its rating. The next day both mines load commercial coal, and are given the same number of cars. The mine loading railroad fuel on the one day has thus received more cars in the aggregate than the mine of equal rated capacity which has shipped only commercial coal. A strict construction of our decisions shows that we did not prohibit the assignment of cars for railroad fuel in excess of the percentage of cars available for commercial loading when the output of a mine was taken for only brief or intermittent periods. No time limit was imposed by us. After we issued our notice to carriers and shippers, dated April 15, 1920, and railroad fuel cars were

considered as assigned cars, the possibilities of the practice were carried to the extreme in some instances and such cars were given to a mine for its entire output for a day or for certain days, and the mine was treated as on a commercial basis for succeeding or intervening days. This was an intermingling of the two ideas of taking a part of the output of the mine and counting against it the cars assigned to it for railroad fuel, and the other provision for taking the entire output of the mine. We found it necessary to exercise our emergency powers under paragraph (15) of section 1 to restrict the practice, and to make it clear that the brief or intermittent use of a mine for railway-fuel supply would not warrant the application of the assigned-car privilege. As previously stated, service order No. 18, since vacated, prohibited the assignment of cars and failure to count them against the distributive share of the mine for the day, or assigning cars in excess of the mine's distributive share for the day, except where the entire output of the mine was taken for a period of not less than six consecutive months. After the cancellation of that order certain carriers again resorted to the former practice of assigning cars for the entire output of a mine or mines for a day or for certain days, and distributing cars to that mine on the other days for commercial loading, and now follow that practice. In the rules proposed the respondents do not recommend that the application of the assigned-car privilege should be limited by a requirement that the railroad shall make term contracts for the entire output of the mines at which the assigned
1464 cars are to be placed. It is conceded that all such requirements are not so covered, and it is claimed that they can not be, and some leeway must exist within which the railroads may apply the assigned-car rule.

The opponents of the assigned car also object to the limitation of the use of the assigned car to output contracts for periods of six months or more, but on different grounds they contend that such limitation would not eliminate the evils produced by the practice, but would bring about additional evils. An operator owning only one mine would have to elect between a complete severance of all commercial connections and a complete renunciation of the assigned cars. His competitor who operates more than one mine and who is in position to continue in both kinds of business would be under no such disability. Under service order No. 18, we permitted the operator who owned a number of mines and had contracted with a carrier or carriers for the total output of one mine to assign cars at some one of the mines of the operators in the same district on different days. This, it is contended, subjects the single-mine competitor to all of the disadvantages of both the output-contract system and the partial-output system. The large operator with a number of mines, if required to confine assigned cars to the mine having an entire-output contract would probably experience labor trouble at his other mines shipping commercial coal.

Numerous operators specialize in domestic coal, and have prepared themselves for its production by the installation of proper machinery. This class of operators is essential to the supply of the domestic coal of the country. During the domestic-coal season they sell the prepared sizes for domestic consumption and the screenings for other purposes. At the close of the domestic season they can not put their prepared sizes on the railroad-fuel market under the six months' contract rule, because they can not afford to enter into such a contract, and could not dispose of the screenings if they did so. The operators would thus be left with screenings which they had no way of shipping, unless given commercial cars or assigned cars for this purpose, either of which would violate the rule. The output-contract rule also involves difficulties because some roads purchase nothing but prepared sizes of screened coal, while others purchase run-of-mine coal and screen and crush it themselves, using the prepared sizes for locomotive fuel and for the heating of buildings and the screenings in their shops.

It is the practice of certain coal-loading carriers to charge cars delivered to them by another railroad for the loading of the latter's fuel, both as assigned cars and as cars delivered under interchange arrangements. This gives the delivering line the benefit of
1465 the assigned-car rule, and also credit for delivery of equipment to the coal-loading road of the same cars. As the coal-loading carriers commonly ship a large amount of the bituminous coal they produce to points upon the lines of connecting carriers, the proper balance of interchanged cars is highly important in conserving the car supply of the originating line. The practice mentioned tends to diminish that supply, and thus decrease the available cars for commercial coal loading. We do not regard the practice as proper.

Much of the voluminous record has dealt with the practical effect of the operation of the assigned-car practice upon mine labor. The evidence is conflicting in many respects, and it does not seem necessary to state it other than generally. The mine operators are not unanimous in their opinions that the result of the assigned-car practice has been detrimental to their industry; but the great majority of the mine operators, and all the representatives of mine labor who appeared are firmly of that conviction. Out of the mass of conflicting testimony it may be conservatively stated as established that the general effect of the assigned-car practice is to attract as many desirable miners as can be given employment to the assigned-car mine, and away from commercial mines, and particularly so in the unionized fields. The commercial mine has a more rapid labor turnover than the mine operating with assigned cars. Often these two classes of mines are located close to each other, and the miners paid upon a quantity basis in the commercial mines are rendered discontented when they are compelled to remain idle a large part of the time because of car shortage, while neighboring mines with assigned cars are operating on substantially a full-time basis. This

is one factor which has contributed to the unsettled labor conditions in the bituminous mining industry during recent years, and has been urged as a reason in support of the maintenance of existing wage scales or for still higher rates of mine pay. Without attempting to equalize the fortune, opportunities, or abilities of all the bituminous-mine operations or their mine laborers, it seems appropriate to consider this effect of the practice under consideration.

The result of the inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production. As it is the commercial supply of bituminous coal which is restricted by the free use of the assigned car, the increased costs are most sharply felt in coal intended for commercial consumption. It appears of record that during the late war, with the elimination of assigned cars the fuel administration simultaneously lowered the price fixed on all coal 10 cents a ton. The increase in cost because of inequality in running time is largely due to the fact that
1166 many of the expenses of the mines are constant; some are reduced but not eliminated by idle time, and the amount of the expenditures eliminated by idle time is proportionately small. The relation between the car supply and these costs is immediate. The weight of the evidence is that mine production costs rise because of a diminished car supply, but at a sharper rate. Without attempting to reconcile the conflicting testimony as to the amount of such increased cost, we may safely conclude that it is considerable and important, both to the mine operator and to the consuming public. In weighing the benefits the railroads derive from the assigned car, this indirect cost to the coal-consuming public must be given proper value.

The protestants contended that in return for the preference in car supply given to mines loading railroad fuel the carrier is able to secure its fuel coal at a lower cost than would be the case if the cars were distributed on a pro rata basis. The record does not support the statement more often made to us outside this record than in it that the railroads deliberately and directly use the assigned-car privilege as a means of coercing unreasonably low prices for fuel.

Mine operators prefer to have the assurance that cars will be furnished for railroad fuel coal, and a promise of this character is one of the factors which influences the making of the contract. If the operators do not have this assurance, there would be a higher price. Without doubt in many cases the assurance of a full car supply tends to bring the railroad buyer and mine operator-seller together upon a lower price basis than would otherwise be agreed upon without that factor being mentioned in the negotiations at all; in some instances the assurance of a good car supply is named or advertised as an essential consideration. For the present we need give this consideration only as it bears upon the fact previously commented upon, that the commercial-mine operator is sometimes forced out of

the commercial business and is compelled by his necessities to take advantage of the assigned-car privilege and to sell his product to a different class of users at a lesser price than he otherwise would. The respondent carriers repudiate the suggestion that they seek or should be permitted to use the assigned-car privilege as a means of securing fuel coal at an unreasonably low price.

In the case of mines which a railroad carrier owns, situated upon its own rails, or where mines are operated under a long-term lease virtually the equivalent of ownership so far as duration is concerned, a somewhat different situation exists with respect to competition with commercial mines than when such mines are privately owned and either leased to carriers or covered by output contracts and operated by their private owners for periods of time such that
1467 they may fairly be said to continue to be actual or potential competitors with commercial mines in the vicinity. The mine owned or controlled by a railroad carrier situated upon the lines of another railroad comes into competition with the commercial mine near by. The practical difficulties of determining whether a leasing arrangement is of such a character that it is removed from the competitive field are manifest. Should the privilege of assigned cars be restricted to mines of railroad ownership, the effect would be to encourage the railroads to buy mines and thus increase the present number of assigned cars, or else to induce them to open new mines of their own ownership, which would not only have the same results, but would undesirably add to the capacity of the already overdeveloped industry of bituminous-coal mining.

There has been much adduced bearing upon the ability of the carriers to secure their reasonable fuel requirements without the use of assigned cars. The operators contend that such needs can be met adequately by one or more of the following methods, without assigned cars: (1) By storing more substantial amounts of fuel coal at points of consumption during periods of inactive demand upon the part of the public, which, it is claimed, can be done without undue expense; (2) by a wider distribution of fuel contracts among producing mines; (3) by contracting that a certain proportion of the coal produced and to be shipped shall be carded for railroad use before deferred customers are supplied; and (4) by order of this commission suspending the applicable rules as to equal distribution in special cases of real emergency, under the powers conferred by paragraph (15) of section 1 of the act. The carriers doubt or deny the practicability of these suggestions. Perhaps singly none of these suggested courses would suffice, but in combination they would greatly mitigate the results which the respondents claim would follow the abolition of the assigned-car privilege. That some other course is practicable is strongly indicated by the fact that many of the great bituminous-consuming railroads have not found it necessary to assign cars to insure an adequate supply of suitable fuel. The argument from individual necessity should not be pressed too

far in this regard in the absence of a showing as to a sufficient experience in operating under the practice of equal distribution.

But the railroads are not the only agencies as to which the public interest requires that there shall be a steady supply of suitable fuel at a reasonable price. There are many important activities which labor under the same necessity as the railroads, who have not enjoyed the privilege of assigned cars, save during a few months in 1920 and 1922 when specially designated in certain individual cases by our emergency service orders, or as they have have em-
1468 ployed private cars. Yet they have all continued to function.

As illustrative, by our service order No. 23, in 1922 we classed equally with railroads other common carriers, the bunkering of ships and vessels, public utilities which directly serve the public under a franchise therefor, street and interurban railways (some of which are competitors of the steam railroads which use assigned cars), electric power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human foodstuffs; hospitals; the United States, State, county, and municipal governments, and their hospitals, schools, and other public institutions. The needs of the Army and Navy are important. If the railroads are to continue supplying their fuel needs by a continuance of the assigned-car practice as proposed, there is good reason we should consider extending the same privilege to some or all of the public utilities and quasi public utilities mentioned.

The circumstances surrounding and subsequent to our decisions in the Traer and Hocking Valley cases are such that the practice based upon the rule there announced can scarcely be given the sanctity of long observance in considering the question of reasonableness or undue preference. We have already shown that the power of assignment during Federal control was lodged in the car-service section of the railroad administration. The rule was not reestablished until April 15, 1920. On October 1, 1920, service order No. 18 further limited the rule in its application, and that order, bottomed upon the emergency powers conferred upon us by paragraph 15 (a) of section 1 remained in force until March 24, 1921, when we instituted the present investigation. From 1907 to the latter part of 1918, there was no general coal-car shortage throughout the country except during the latter part of 1912. The rule announced in the Traer and Hocking Valley cases was never given nation-wide application. As the rule is unimportant to the carriers in times of car surplus, it was only during the latter part of 1912, and during the latter part of 1916 and 1917, that the carriers in the eastern part of the United States relied in a material way upon the rule in the securing of their fuel. The latter car shortage disappeared in April, 1918, and upon the recurrence of a period of shortage, the railroad administration had ordered the abolition of the practice. Shortly after Federal control was terminated, as previously stated, we assumed control of the situation during the car shortage of 1920, due to the so-called outlaw

strike, and exercised our emergency powers until the complete termination of the period of shortage. Similarly, in the recent car shortage due to combined effects of strikes of the bituminous-coal miners and railway shopmen, our special service orders and
1469 directions controlled the distribution of equipment for coal loading. Indeed, during the life of certain of our service orders in the shortage of 1922, we notified the carriers that the use of the assigned car was regarded as inconsistent with the letter and the spirit of the general plan of distribution which we were seeking to effectuate. From the beginning of the car shortage of 1916, at least, the operation of the rule has been bitterly contested and opposed by the majority of the commercial-mine operators, and solidly by mine labor wherever organized.

The rule evolved in the early decisions was not the fruition of ripe experience. The Hocking Valley decision, as we have stated, was in 1907, and the Hillsdale case was decided in 1910. Commissioners Clements and Lane had joined in the reports and orders in both the Hocking Valley and Traer cases. In a dissenting expression in the Hillsdale case, Commissioner Lane, Commissioner Clements concurring with him, referred to the whole question of coal-car distribution as then being in a state of flux, and that on the investigation made by the commission three years before, it was brought out and clearly established that the distribution of cars to coal mines was based largely upon interest, prejudice, and pull. Hillsdale case, supra, page 387. Subsequent to the Hocking Valley and Traer decisions and other related cases an effort was made to establish rules which would not be open to objection on the ground of discrimination, but the rules were referred to by Commissioner Lane as tentative and experimental and not representing the crystallized experience of years.

III

We may now consider use of private cars upon an assigned basis. Much of what has been said as to the practical effects of the practice of assigning railway fuel cars, system and foreign, is equally descriptive of the results of the assignments of private cars. There are certain additional matters which require consideration. In passing, we may repeat that the assignment of private cars was not prohibited by the United States Railroad Administration.

In the Hocking Valley case we condemned the long-existing practice of failing to charge private coal cars against the percentages in distribution of cars to coal-mining companies. In effect we held that private cars should be given to the mines to which they were consigned or assigned, but that they must be counted against the distributive share of the mines. If the number of such specially consigned or assigned cars equaled or exceeded the distributive share of a mine receiving them, it should have no additional cars, but if not
equal to the distributive share, the mine should be given only
1470 sufficient additional cars to make up its distributive share.

Our holding is thus seen to have been a marked limitation upon a practice in effect and was based upon the issue as to undue discrimination or preference.

Subsequently, in the Hillsdale case, supra, the majority of the commission said that the general theory for the distribution of coal-car equipment according to the general trend of the decisions as stated in Logan Coal Co. v. P. R. R. Co., 154 Fed., 497, 503, "has appealed strongly to this commission as being fair, reasonable, and nondiscriminatory." 19 I. C. C., 364. The nature of the trend was stated thus by the court in the cited case:

"The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other." [citing cases.]

The majority insisted that the owner of private cars was entitled to their exclusive use, but held that all cars of this description must be counted against the distributive share of the mine receiving them. Notwithstanding the rule requiring pro rata distribution quoted by the majority as having appealed strongly to the commission as fair, reasonable, and nondiscriminatory, the report continued:

"Although the mine owning private cars * * * is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them."

And the majority denied the request of the complainant that the defendant be required during percentage periods to distribute all coal cars ratably among the operators according to a rating theory which we were unable to adopt.

As will appear subsequently, Commissioner Prouty dissented because, in his opinion, the majority should have gone much further than it did in wiping out inequality in the treatment of the private assigned cars as compared with the distribution to the commercial mines.

In many cases we have had occasion to consider the nature of the obligations and rights of the owner of private cars and of the carrier which transports them upon its rails, with particular reference to the situation of other shippers who do not own such cars and are dependent upon the railroad for a supply of equipment. The development of the relation from the time when the railroads were simply toll lines and the shipper furnished his own car is stated in In the Matter of Private Cars, 50 I. C. C., 652, 656, and is well-known history. But the carriers are no longer regarded as toll lines,
1471 even as to the comparatively few privately owned cars of various descriptions which they transport. The Pennsylvania seemingly has some charter duties as to the transportation of pri-

vately owned cars, but such obligations can not defeat the power of Congress to compel equality of treatment of shippers in interstate commerce.

Commissioner Prouty, in his dissenting expression in the Hillsdale case, said:

"The use of private cars is growing less, and the question will, in all probability, never be a living one. I do not, therefore, care to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service."

There have been many cases in which we have considered the relation of the private car to the railroad as it affected the rate paid by its owner as compared with the rate paid by others. The parallel between preferences and prejudices in respect of rates is manifestly close with preferences and prejudices in respect of service; indeed, with a low-grade commodity such as coal, it often happens that an inequality with respect to car distribution, controlling, as it does, the quantity of production possible, is much more important to the shipper than the amount of the transportation charge he pays. Certain principles are clearly stated in our reports, running throughout from almost the creation of the commission to the present day. The private-car owner has no right to demand that his cars be transported over the lines of a carrier which has not consented thereto. The obligation of furnishing an adequate supply of equipment by statute rests upon the carrier, and does not rest upon the shipper. The duty can not be transferred to nor required of the shipper. The use of private cars by railroad carriers has been recognized by Congress, which has provided for the control of the use of such equipment by us, under the provisions of the interstate commerce act, by means of a mandate addressed to the carriers subject to our jurisdiction. We do not deal with the private-car owner as such. Congress has provided that if a shipper furnishes an instrumentality used in the transportation of property owned by him, the charge and allowance therefor shall be no more than is just and reasonable, and has authorized us to fix the maximum reasonable charge to be paid by the carrier for the use of the instrumentality so furnished. (Paragraph (13) of section 15; compare paragraph (14) of section 1.)

But the rule of Congress goes further. The term "car service," as defined in paragraph (10) of section 1, clearly includes the supply and movement of private cars. By paragraph (11) it is made the
1472 duty of the respondents to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. By paragraph (14) we are given jurisdiction to establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to the act, including the compensa-

tion to be paid for the use of any car not owned by the carrier using it.

Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment for transportation. Throughout we have recognized that when the carrier permits the use of the private car upon its rails, it is responsible for the manner in which the service is conducted in that car, and that the car becomes in all respects as if it were one of the general stock of those owned by the carrier, and subject to the same liabilities and responsibilities as to the use in interstate transportation.

The position taken by the courts and by this commission was well summarized in the report made by the committee on car distribution and car shortage to the National Association of Railway Commissioners in the promulgation of the Uniform Demurrage Rules, in 1909.[1] The committee was composed of a representative of each State that had a railroad commission and Commissioner Lane of this commission:

"It is the carrier's duty to furnish all facilities of transportation, and it can not permit the presence of any equipment upon its line to work a discrimination as between shippers. • • •

"When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after the transportation is concluded, it leaves the carrier's service. • • •

"The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee.

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1473 "A car owner can claim no advantage as a shipper that would not accrue to him if the car were owned by a different person having no interest in the freight."

The language quoted was cited by us in Proctor & Gamble Co. v. C. H. & D. Ry. Co., 19 I. C. C., 566, 558, where we held the private car liable to demurrage charges, even when on the tracks of the owner. The decision was sustained in Procter & Gamble v. United States, 225 U. S., 282. In the margin we refer to some additional

[1] Proceedings of National Association of Railway Commissioners for 1909, page 214. The first paragraph quoted was taken from the report of the committee on car distribution and car shortage of the preceding year. Id., 1908, page 120.

decisions in which the principles stated have been given application generally in matters relating to equality of rates.[1]

After the Hocking Valley case and subsequent decisions to the same effect, the ownership of private coal cars gradually declined until about 1916. But the prophecy of Commissioner Prouty was not borne out by subsequent events or by present tendencies. Under the impetus of the war demand for coal and prolonged coal-car shortages, the ownership of private coal cars increased. There can be no doubt the incentive was the more regular and larger car supply provided under the operation of the assigned-car practice. The following statement shows the number of privately owned coal and coke cars as of January 1, 1913, and for each year from 1916 to 1922:

Year	1913	1916	1917	1918	1919	1920	1921	1922
Cars	24,160	14,780	14,679	14,693	20,483	18,955	20,411	27,927

The record indicates that the increase in the ownership of the private cars within recent years has largely been on the part of the public utilities, the steel plants, and the by-product gas producers, many of whom sell their gas directly or indirectly for public consumption. With each of these classes of owners, steadiness of production is highly important; they are large users of specialty forms of coal, frequently of a high grade, and often compete keenly among themselves for the coal of certain preferred varieties found in particular fields. It is significant that the fuel cost is either passed on directly to the customers of this class of users, or is capable of absorption in the manufacture cost. The consequences of the assignment of private cars are more strongly felt in certain localities than in others. On some railroads the question is relatively unimportant.

Upon certain divisions of the Pennsylvania, the Louisville & 1474 Nashville, and the Chesapeake & Ohio the private cars are a considerable proportion of the whole. It is abundantly made clear from the record that as competition becomes more keen, more and more the public utilities, steel producers, manufactures of by-product gas, automobile manufacturers, certain chemical manufacturers, glass works, and other industries likewise absolutely dependent upon a steady supply of coal, rather than face ruin each recurring coal-car shortage, will be compelled to acquire private cars which they may have assigned. The result is not only an increasing gross inequality between users of this form of equipment who are able to afford

[1] Schofield v. L. S. & M. S. Ry. Co., 2 I. C. C., 90; Worcester Excursion Car Co. v. P. R. R. Co., 3 I. C. C., 577; Rice v. W. N. Y. & P. R. R. Co., 4 I. C. C., 131; Shamberg v. D. L. & W. R. R. Co., 4 I. C. C., 630; Independent Refiners Assn. v. W. N. Y. & P. R. R. Co., 5 I. C. C., 415; Truck Farmers Assn. v. N. E. R. R. Co., 6 I. C. C., 295; Carr v. N. P. Ry. Co., 9 I. C. C., 1; Rattle v. P. M. R. R. Co., 12 I. C. C., 179; Pennsylvania Paraffin Works v. P. R. R. Co., 34 I. C. C., 179, and Armour & Co. v. E. P. & S. W. Co., 52 I. C. C., 260.

the very considerable expense in procuring and maintaining such equipment, reflected immediately in the disproportion between the amount of their output or consumption as the case may be, but also that the available facilities of the railroad carrier other than cars—locomotives, tracks, and terminals—are taken up in great degree by such classes of preferred users, so that the commercial mines are and will find themselves unable to procure transportation for even the ratable share of the cars which the carrier owns and sets for them. If the practice is continued, it is not too much to expect that in future periods of car shortage due to insufficient motive power, strikes of maintenance-of-equipment employees, and like causes, the scramble for coal on the part of users who can afford to pay the price will lead to the effort to assign privately owned locomotives and train crews privately employed in the manner in which privately owned cars are now assigned. During the car shortage of 1922 we received requests to this effect.

The following statement shows the number of days worked during the year 1920 by certain mining companies owning private coal cars and the average number of days worked by all bituminous coal mines within the State of Pennsylvania, including the assigned-car mines:

Operator	County	January	February	March	April	May	June	July	August	September	October	November	December	Total
Berwind-White C. M. Co.	Cambria	24	20	25	21	24	24	26	26	25	25	24	25	290
Do.	Clearfield	22	13	18	19	19	17	15	16	7	17	17	17	197
Maryland Coal Co. of Pennsylvania.	Somerset	24	20	26	22	24	23	25	26	25	25	25	25	296
Penn Mary Coal Co.	Cambria	25	24	27	24	26	25	26	23	25	26	26	26	303
Union Coal & Coke Co.	Indiana	24	17	23	23	18	20	21	23	26	26	24	26	271
Westmoreland Coal Co.	Washington	26	24	26	24	26	23	23	25	24	26	24	23	294
	Westmoreland	17	16	18	16	17	19	19	23	22	23	24	25	239
Average all bituminous companies in State		19	17	20	17	17	19	19	20	20	20	19	19	228

1475 Another complaint of the protestants is that privately owned cars enjoy the use of a disproportionately large part of the facilities of the carriers. During 1920 the operations of the United States Coal & Coke Company on the Cumberland division of the Louisville & Nashville Railroad had a rating equal to one-sixteenth of the entire rated capacity of mines on that division, and their private cars used for their coal loading received one-eighth of the use of the transportation facilities. Users of private cars received 100 per cent of their requirements regardless of the shortage of motive power, while unassigned mines received a much lower percentage because of the inequitable distribution of such power. The private-car owners assert that such preferential service can only exist when there is a general shortage of railroad facilities other than coal cars, such as the conditions brought about by the railroad shopmen's strike which became effective July 1, 1922.

The practices of the carriers differ. The Pennsylvania apparently permits the owner of the private cars to place its cars for the owner loading at any mine the owner designates, even though such loading be for one day only. On the Chesapeake & Ohio, on the other hand, the placement of cars for the owners loading at mines other than those owned by him is permitted if regularly continued for a considerable period. But where the assignment is merely occasional the placement of cars is made on the same basis as system cars. Any overplacement of private cars at a mine on one day is subsequently adjusted to effect an equal distribution as between all mines. The Norfolk & Western does not handle private coal cars on its line. The Illinois Central favors the private coal car because it reduces the necessity of railroads furnishing themselves with equipment to take care of the gross volume of business that ordinarily they will be required to take care of in their own cars. The United States Steel Corporation owns a large number of private coal cars which are loaded at mines on the Illinois Central. The cars are delivered to the Illinois Central by the Elgin, Joliet & Eastern in train lots, and after the cars are loaded they are returned by the Illinois Central in the same manner.

The record indicates that during 1920 and the summer of 1922 certain carriers, particularly the Pennsylvania, Chesapeake & Ohio, and the Louisville & Nashville, accorded to private-car owners a greater use of their facilities than they should properly receive. The extent to which this was done, however, is not clearly established of record. The conditions of the past year were abnormal. The carriers' locomotives, due to the shopmen's strike, were in poor condition. The strike in the bituminous coal fields made a heavy demand for coal from the nonunion fields, a large part of which are
1476 located upon the lines of the three carriers mentioned, and taxed the carriers' facilities. The termination of the coal strike increased the demand for coal, with a resulting greater burden upon the carriers' already overtaxed facilities. In the congestion when the carriers were unable to transport promptly all traffic offered them, certain of them did prefer the handling of private cars from motives of convenience. These cars were usually moved in train lots in shuttle service, and avoided the additional switching and spotting service necessary in furnishing a like amount of transportation to the numerous mines shipping commercial coal in system cars. The abnormal conditions of the summer of 1922 illustrate the natural effect of the assigned private-car practice under conditions which should call for the utmost consideration of all shippers in order that the transportation disabilities of the carrier should be borne as equally as possible. Coal in private cars under the present arrangements is susceptible of easier movement than similar shipments in railroad cars because it usually moves regularly between the same points in large or trainload lots. This merely indicates the greater likelihood that such cars will receive preferred treatment.

There are other practices of some of the carriers in the handling of private cars which are not free from criticism. We have in mind particularly the placement for the prviate-car owner of its own cars at certain mines to be loaded with coal for the owner's use from day to day and the placement of system cars at the same mines on alternate days; if on the days on which such private cars are placed they exceed the pro rata share of cars to which that particular mine would be entitled if dependent wholly upon system cars, no subsequent adjustment of such overage is made. Any attempt on our part to mitigate the bad effects of such a practice is but temporizing. The private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars, or he is entitled to no preference whatsoever on account of that ownership, and a compromise is untenable.

The owners of private cars contend that such cars are essential to insure a regular and adequate supply of coal; that the cars were purchased only after all other remedies had been exhausted and that it was the only method whereby their coal requirements might be met, except by the assignment of cars on order of the Government. It is claimed that the use of private cars during car-shortage periods releases railroad cars for strictly commercial mines, which otherwise would have to be placed at private-car mines. This overlooks the fact that particularly in times of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more im-
1477 portant to him than a slight addition to his allotment, effectuated by giving his neighbor and competitor a better car supply. Except during car-shortage periods the investment which these owners have made, estimated at approximately $30,000,000 is of no practical utility to them. The mileage allowance paid by the carrier for the use of private cars, which is sufficient when the cars are employed in transportation service, is not adequate compensation for ownership when there is a car surplus. But the investment was voluntarily made, by persons not common carriers.

Congress has given the coal consumer a right to demand that adequate transportation facilities be provided by the railroad carriers and has afforded a remedy for the enforcement of that right. We are now prosecuting an inquiry upon our own motion, No. 14489, under the provisions of section 1 of the act, as to the adequacy of the facilities for the performance as common carriers of car service by each of the railroads subject to our jurisdiction, with a view to making an order requiring the respondents to provide themselves with such safe and adequate locomotives and cars as may be warranted by the facts as shown, and as required by law. This power upon our part, and remedy afforded to the shipper, first came into the interstate commerce act as one of the amendments made by the transportation act, 1920. The change in the law differentiates the

present case from all those in which the assigned-car rule was developed as prior to February 28, 1920, we had no power to require a carrier to provide itself with reasonable facilities such as equipment, no question of discrimination being involved. United States v. Pennsylvania R. R. Co., 242 U. S., 208.

Upon the facts shown of record we find and conclude that in the distribution of cars for transportation of coal among the bituminous coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel.

We further find and conclude that all cars should be dis-
1478 tributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall preclude the commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

There appears to be no reason for the continuance of the investigation as to carriers serving solely anthracite coal mines, and the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, will be discontinued.

We will enter an appropriate order, effective September 1, 1923.

EASTMAN, Commissioner, concurring:

I concur in the majority report, except as to the conclusion "that the rules proposed by the respondents do not in terms contravene

paragraph (12) of section 1 of the act." Paragraph (12) contains this provision:

"During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count *each and every car* furnished to or used by any such mine for transportation of coal *against* the mine." [Italics mine.]

I am unable to escape the conclusion that it was the intent and is the meaning of this provision that in times of car shortage every mine should be limited to a pro rata share of the available car supply, and that in computing this share every car furnished to the mine, whether private car or railroad-fuel car or car for commercial loading, should be counted. Under the assigned-car practice now in effect, however, it appears that the number of such cars placed at a mine may, and often does, exceed its pro rata share of the available car supply. It does not seem to me that in such cases the cars are being counted "against" the mine. The purpose of paragraph (12), as stated by the House committee when it was reported,
1479 was to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars.'"

I am aware that this view is not in accord with the opinion expressed in Assignment of Freight Cars, 57 I. C. C. 760, a report in which I joined. It is a view, however, reached after more consideration than I was able to give to the question at the time of that ex parte report.

I am authorized to say that Commissioner Campbell concurs in this expression of opinion.

HALL, Commissioner, dissenting in part:

I concur in the conclusion of the majority that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act, but must dissent from the findings of unreasonableness and undue prejudice.

The car-distribution rules condemned by the majority are those prescribed by us more than 15 years ago. Our orders prescribing them were upheld by the Supreme Court of the United States. We then recognized that a carrier by railroad has the right to secure its fuel supply either from mines which it owns or from mines the entire output of which it purchases; and that if its contracts for fuel cover such supply as it reasonably needs for current operation it can use its equipment to procure its fuel even though operators of commercial mines are thereby deprived during periods of car shortage of some cars which they would receive on a strict pro rating of the available supply. In other words, we found that this use by a rail carrier of its cars did not constitute an unjust discrimination or undue prejudice prohibited by the act. It is well settled that mere difference of treatment does not constitute unjust discrimination or undue prejudice. The right which we found to inhere in a rail carrier has not

been abridged or denied by subsequent legislation. It rests upon the fact, elementary, fundamental, and partaking of the highest public necessity, that a railroad must have an adequate supply of fuel in order to supply the people with adequate transportation. This of course means that a railroad must have a reliable, steady flow of coal, of even quality best suited to its different needs, at reasonable cost.

The majority take away this right and brush aside the public necessity. They substitute nothing which will protect either the public servant or the public served. In focusing their attention upon the commercial-mine operator they seem to lose sight of the entire traveling and shipping public, as well as the myriad industries dependent upon transportation, all entitled to as much consideration as the producer of coal when the issue of unreasonableness or undue prejudice is raised. In effect, although not in intent, their
1480 findings subordinate the needs and interest of all others to those of the coal industry. But even in that restricted field it little profits to compute the fractions of a car which uniform prorating would add to the daily supply of a commercial mine if the carrier lacks power to place the empties or haul away the loads. Again, it is said that the commercial coal goes in part to public utilities of various kinds whose needs are as great, and impressed with a public interest as great, as those of the railroads. That is true, but the difference is that the railroads reach the mines and the other utilities do not. Before they can use the coal the railroads must bring it to them. Therefore in their interest, and that of the public they serve, the supply of fuel for the railroad service comes first in importance as well as in time of use.

Until now the commission has recognized that fuel was as indispensable to the rail carrier as the rails or ties or roadbed or cars or locomotives, not at some times merely, but at all times, if the public is to be adequately served. The duty of the common carrier is to carry for all who offer, "unless his coach be full."

Use of the assigned car and the private car is not ideal, but it is at least practical, has been tested in times of stress, and no workable substitute therefor has been developed or is now prescribed. The alternatives left are confiscation by the carrier or priority orders by us. Is not this a recognition in another form of the public necessity that the carriers must have fuel in preference to other consumers? The majority would reserve to the commission the right to direct a discrimination in the distribution of cars which it condemns as unlawful when practiced by the carriers. Can it be said that the preferential assignment of cars under orders of the commission will not tend to bring about the very conditions in the coal-mining industry for which the assigned-car practice is here condemned? The harm, if harm there be, to the industry will be just as serious if brought about by a series of service orders as if brought about by application of the general rules prescribed and sanctioned by us and now in effect.

Respondents propose to include in their definition of assigned cars the words "and cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission." This is not condemned by the majority. But the treatment of private cars, and cars assigned for railroad-fuel loading in accordance with our cited decisions, is condemned as both unreasonable and unduly preferential. If unreasonable, how can we by priority orders make the same treatment reasonable? Our power under section 1 (14) is to establish reasonable rules and practices with respect to car service, and under section 1 (15), in time of emergency, to make such just and
1481 reasonable directions with respect to car service as in our opinion will best promote the service in the interest of the public and the commerce of the people.

We are not given carte blanche, at discretion, to do anything or everything which may occur to us. The Congress has provided the yardstick. What we direct must be just and reasonable, and in the public interest. It follows that we can not, even in time of emergency, direct what we have deliberately found and declared to be unjust and unreasonable. If and while the finding of the majority stands unreversed it is difficult to see how the commission can relieve lack of railroad fuel by priority orders.

This brings me to what I regard as the fundamental misconception of the majority. They condemn the maintenance of rules which tend to cut down or eliminate altogether so-called car shortage, and occupy themselves with expedients for ameliorating the effects of car shortage, when it comes. Car shortage is frequently not so much a lack of cars as of power. That was true in 1922. Car congestion, also, is largely due to lack of power. For power an adequate supply of proper fuel is indispensable. The rules proposed by the carriers tend to prevent recurrence of emergency. Priority orders deal only with the emergency after it has come. It will be conceded that the railroads as producers of coal for their own fuel use, as purchasers of coal for their own fuel use, and as consumers of that coal, are not subject to sections 1 or 3 of the interstate commerce act, or to regulation by us based on those sections. However profoundly their consumption of 28 per cent of the country's annual product of bituminous coal may affect mining fields, or individual operators, or mine labor, it is not for us to say that what they may do as such producers or purchasers is unjust, or unreasonable, or unlawfully discriminatory. It is only when they use instrumentalities of interstate commerce in moving that coal, if their own, or engage in common carriage of it for each other, that they become subject to these provisions of the act, because in their capacity of common carriers they must use their instrumentalities for the equal benefit of all who seek common carriage without undue preference of or prejudice to any. As common carriers, then, and only as common carriers, are they before us in this proceeding, even though any one of them, in moving its own coal for its own use from origin to destination on its

own line, is not engaged in common carriage. And this is so because it is using instrumentalities of common carriage in the movement.

We must therefore dismiss from our thought all consideration of the effect upon the mining industry of carriers' operations as producers or purchasers of fuel, and confine ourselves to what the carriers do in and about moving that fuel, bearing in mind
1482 that we have no power under the act to take away from any carrier its rights. It has the right and it is its duty to secure an adequate supply of fuel. That can not be denied or taken from it. The public has the right to a transportation machine fully protected and able to function at all times. That right is not fully protected by service orders from us after an emergency has arisen. The task of hauling and distributing railway fuel drawn from many mines is complex and of exceeding difficulty. Because of the varying qualities and characteristics of different coals the efficiency of fuel is easily impaired, with a resulting direct loss in efficiency of the equipment. Obviously the modern locomotive can not burn to advantage every kind of coal that is fed into it. The fuel used in a stoker-fired locomotive is not the same as that used in a hand-fired locomotive. Many instances of the different uses to which railway fuel is put could be mentioned. But certainly the public must have regular, continuous, and ample service. If the fuel supply fails, the service fails; if the fuel supply deteriorates, the service deteriorates. Whatever the cause, the effect is immediate. Much harm could be done before we could find that an emergency existed which called for the exercise of our extraordinary powers and before whatever orders we issue could become effective, even if such orders were reasonable and would remedy the situation.

The public interest requires that carriers should manage their properties in an economical and efficient manner. It certainly can not be contended that to abolish the present practice of the Baltimore & Ohio, for instance, as set forth in the majority report, will be conductive to economical and efficient operation.

Under our statutory power we recently authorized a loan from the United States Treasury to an important carrier, which has practically no coal mines on its line, to enable it to secure 1,000 coal cars. These cars were desired and needed to handle fuel coal for the carrier because of the unreliability of car supply on the originating lines. If the majority report is right, the carrier was unwise and we were improvident. This carrier had placed orders for fuel last year with mines which depended upon the originating lines for cars. The carrier was forced because of defaults under its contracts to go into the open market and purchase 300,000 tons of spot coal at prices which averaged $1 per ton in excess of the contract price.

Beyond all shadow of doubt what we are here doing will substantially increase the fuel cost of the carriers. The public must

pay that cost. In busy times the forgetting of contracts has not been unknown in the coal industry. Carriers are then forced
1483 into the spot market and compelled to pay very high and in some instances extortionate prices, or else resort to that evil of evils, confiscation, which brings in its train an ultimate adjustment at the top price. These are not mere speculations of what may happen. We know from experience that they have happened and must happen again when carriers are denied recourse to the only effectual preventative.

The assigned car enables the railroad to select its coal to meet its various needs, permits the concentration of purchases and policing as to quality as well as the assembling and handling at minimum expense, and guarantees delivery. It also results in regular mine operation, steady employment of miners, reliable supply, and thereby in lower costs. The ultimate effect is efficiency and economy. This is obviously in the public interest. Whether the assigned car is for the greatest good of the greatest number is apparently of no concern to the operators who assail it.

Much of the opposition to the assigned car is based upon its effect on mine labor. It is not for me to point out the shortcomings of the coal industry, overdeveloped as it is, with thousands of mines so situated that they can only be operated at a profit when there is a runaway market. An adequate all-the-year-around supply of transportation would leave many of those mines permanently closed, and naturally their operators become the stormy petrels of the industry. The record shows that in six years the number of mines, not including wagon mines, grew from 3,669 in 1916 to 8,722 in 1921. The term "car shortage," as used by coal operators, is usually applied with reference to the capacity of the mines. That capacity far exceeds annual consumption or demand. Whatever may be the troubles of the coal industry they can not and will not be remedied to any appreciable extent, if at all, by the action of the majority.

In Assignment of Freight Cars, 57 I. C. C., 760, 766, we said what is as true to-day as it was then:

"No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under Federal control and the production, distribution and marketing of coal was under a war time Federal administration.

* * * * * * *

"Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be

substituted for the rule to which some objections have been made. No one has suggested such a substitute rule."

1484 Thus far I have dealt chiefly with railroad cars assigned for railroad fuel. Private cars are included in our former decisions as in the rules which respondents now propose. Some of the operators own and use private cars and perhaps for that reason the attack upon the private car is not as concerted or vehement as upon the assigned railroad car. My brother Daniels truly observes that the private car is not an outlaw. At this stage of our rail development and equipment it serves a useful purpose.

Everything in this record tends to show that the private ownership and control of coal cars results in greater economy and more efficient use, and, of course, the whole public is to that extent benefited. Here as elsewhere throughout this proceeding we should heed the paramount interest of all classes of shippers, the railroads, and the entire public, and not let those interests be obscured by the demands of one class of producers. Acting under what has heretofore been a right, recognized by statute and by us, shippers, particularly those who are given preference in our service orders, have tended more and more to equip themselves with their own coal cars. This should be encouraged, for, if many shippers would provide their own cars, the carrier equipment available for others, particularly the smaller shipper, would be greatly increased, car shortages would be reduced, the necessity for service orders would be lessened, and thus the public interest would be served to a substantial extent.

In our report in In the Matter of Private Cars, 50 I. C. C. 652, at pages 672 and 673, we said:

"For more than 30 years privately owned cars have been extensively used to transport commodities in interstate commerce. They came into use originally because the railroads would not, or did not, supply them in sufficient quantities to meet the demand. • • • If private ownership or control of cars of particular types results in greater economy and more efficient use, the whole public is to that extent benefited.

• • • • • • •

"In the beginning carriers could no doubt have insisted upon their right to furnish all equipment. They did not do so, and in the course of years there has grown up a system of private ownership of such magnitude and importance that it must be reckoned with as an existing condition. • • •

"The system of the use and supply of private cars that now exists can not be at once and radically changed, without serious consequences to shippers, carriers, and the public."

The power to tax is the power to destroy. Not so with the power to regulate. It should be used to throw about the use of assigned cars, including private cars, such proper precautions and restraints as will promote the public interest, but not to do away with the use itself for all practical purposes. We are dealing with the rights and duties, as well as the imperative needs, of the great transporta-

tion systems upon whose adequate functioning the welfare of
1485 the whole country depends. The majority by its finding of unreasonableness in what the carriers do to forestall impairment of car service throws open to challenge the reasonableness of such priority orders as the commission may put forth in future attempts to ameliorate that impairment when it comes; and by its finding of unlawful discrimination condemns the exercise of a carrier's right, instead of surrounding it with appropriate safeguards against abuse. Subject to such safeguards, which can readily be prescribed from the record now before us, the rules proposed by respondents are to my mind founded on reason, fortified by experience, abundantly justified by public need, and free from unlawful taint.

For the reasons which I have endeavored to indicate, as well as for others well expressed by my dissenting brethren, I am unable to concur in these findings of the majority.

DANIELS, Commissioner, dissenting:

I concur in the report so far as it construes paragraph (12) of section 1 of the act.

I am unable to concur in the finding that the present practice of assigning private cars and system or foreign-line cars for railway fuel to bituminous-coal mines is unjust or unreasonable or unduly or unreasonably prejudicial.

My reasons for withholding my concurrence in the report's finding may be summarized as follows: First, the right of a common carrier to obtain fuel for carrier purposes is based on such paramount necessity that the assignment of cars to mines whose entire output is taken by the carrier, even though such assignment of cars disregards a pro rata allotment of open-top equipment among all mines, is not unduly preferential of the carriers or prejudicial to the shippers of commercial coal. Unless the carriers obtain sufficient fuel of the character best suited for effectively moving their locomotives, it is apparent that efficient and economical operation is rendered difficult or impossible. The resort by carriers generally to the use of the assigned car would indicate that their experience demonstrates that this system is the most effective, efficient, and economical to attain the end sought. Nor am I persuaded that the abolition of the practice under the present rule will have any other effect comparable with the increase price of fuel to the carriers and a consequent increase in the cost of transportation. I am not persuaded that the abolition of the present practice will appreciably reduce the net cost of mining or moving commercial coal. New England carriers testify that the abolition of the practice will require a doubling of the amount of coal currently stored. Such augmentation of storage
will absorb for railway-fuel use an additional number of
1486 open-top cars. It will saddle New England carriers with an additional cost per ton for the additional amount of coal they will have to store. It will augment the per diem and car rental. The same or similar effects may be anticipated in all regions of the country. Every additional car absorbed for the supply of railway fuel

will lessen to the same degree the number of open-top cars available for general commercial use. It is argued that the abolition of the rule will permit an increase in the working time of commercial mines. The possible increase is, in the first place, not great quantitatively. It may amount to three days per month. There will be a corresponding diminution in the working time of the mines supplied now with assigned cars. The diminished overhead expenses per ton in the first instance will be offset by the increased overhead expenses in the second. Moreover, it must be borne in mind that, except in periods of shortage of open-top equipment, there will still continue a difference in the working days per month between mines which secure large contracts covering their entire output and other mines which are not equally successful in making similar contracts for the disposition of their coal. When it is remembered that, taking a period of 10 or 20 years, the number of months in which there is a shortage of open-top equipment is a very small percentage of the total time, it would appear that the collateral effect of equalizing working time between commercial mines and assigned-car mines in the period of shortage of open-top cars will be in the long run almost negligible. The report properly indicates that the basic difficulty in the coal situation is the overdevelopment of bituminous mines and the vast potential oversupply of current requirements. This fundamental difficulty will persist despite the abolition of the assigned-car rule.

In short, so far as railway fuel is concerned, the assigned-car rule has proved on the whole a workable means of affording an adequate fuel supply of the proper quality and at a low price per ton. The revocation of the rule, in my judgment, will jeopardize the regular supply of dependable railway fuel; it will make for increased locomotive failures by reason of the inability of the carriers to obtain the grade of fuel which is most efficiently employed; it will augment the price of railway fuel without appreciably affecting advantageously the price of commercial coal; and it will render inevitable, in times of emergency, a resort to emergency orders carrying priorities which, in essence, are an admission of the necessity and utility of the present practice.

So far as the supplying of connecting carriers with coal is concerned, many of the considerations outlined above will apply. These connecting carriers on whose lines coal in sufficient amount is not mined now own open-top equipment which they may in part
1487 allot to other uses upon their own rails and thereby make an additional draft upon the open-top equipment of the carriers upon whose lines coal mines are located. Such a withdrawal will tend only to lessen the pool of open-top equipment now available for the movement of coal traffic generally.

So far as the so-called private cars are concerned, the situation is slightly different, although I am not persuaded that the abolition of the present practice will result in any advantage to the public generally or to the ordinary shippers of commercial coal. With the violent fluctuations in the coal demand as between periods of in-

tense industrial activity and periods of industrial depression, it is perhaps questionable whether the railroad carriers can be reasonably expected to have ready at all times open-top equipment of their own ownership capable of carrying the peak load. Many private cars have been provided by their owners for just these periods of peak demand. They have thought it wise policy to make the investment to an aggergate amount of something like $30,000,000 rather than to risk their coal supply upon available equipment of carrier ownership or to confront the necessity of having to pay spot prices for coal in a runaway market. The abolition of the present practice limits the availability of these private cars for transporation purposes. For example, a public utility may turn over to a carrier 100 cars for placement at mines where the utility owner has contracted for the entire output. At present all of these cars would be placed at the mine, and, if the output suffices, they would all be immediately loaded and moved. My understanding is that, under the change in the rule, while these private cars would have to be placed eventually at the designated mine, only the mine's ratable proportion could be moved at a time when there was a general shortage of open-top equipment. If the shortage amounted to 50 per cent, then half of these privately owned cars are required for the time being to stand idle on track and may not be moved except in accordance with the rule that assigns all open-top equipment to all mines in proportion to their respective ratings. How such a withholding of these cars from the work of transportation, even though for a temporary period, can benefit the public generally I am unable to see.

It should also be remembered that the private car under the law as it now stands is not an outlaw. The act contemplates the furnishing of service and of facilities by the owner or the shipper of freight. Section 15, paragraph (13), provides that—

"If the owner of property transported under this act directly or indirectly renders any service connected with such transporation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the
1488 commission may, * * * determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished * * *."

Clearly, private cars are an instrumentality.

In our report In the Matter of Private Cars, 50 I. C., 652, 672, we say:

"An amendment to section 1 of the act, approved May 29, 1917, provides as follows:

"'The Commission shall, after hearing, on a complaint or on its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier, and the penalties or other sanctions for nonobservance of such rules.'

"The Congress has thus recognized the use of privately owned cars in transporting the commerce of the country, and has provided for their control by the Commission through rules and regulations of carriers hauling them."

The warrant for the carriers' use of such an instrumentality is found in the act. For us to make a finding which shall in effect restrict, or cripple, or prevent the use of such an instrumentality appears to me to defeat the plain expectation of the Congress expressed in the section above quoted. It may even be suggested that such action on our part offends against the constitutional protection thrown about private property. It is urged that private coal cars now absorb a disproportionate share of carrier's power and rails. But the legalized use of instrumentalities furnished by shippers implies the right to use a commensurate share of carrier power and tracks. Some of these private owners of open-top equipment utilize such equipment as a daily necessity in carrying on ordinary industrial operations where a steady supply of coal is absolutely indispensable. Other owners of private cars are public utilities supplying gas, electricity, and local transportation. Where concerns of either character, in reliance upon the lawful use of private equipment, have made substantial investments therein, I question the wisdom as well as the legality of impairing the serviceableness of such equipment by substituting the practice carried by the majority report. In the long run it will amount to the unsatisfactory substitution of hastily issued emergency and priority orders whose effectiveness will be less than that secured through adherence to the present workable arrangement.

In outlining the above objections to the majority report, I am free to say that many of the abuses connected with or attendant upon the assigned-car rule might be properly controlled and virtually eliminated. I think, however, that the remedy proposed is likely to prove far worse than the difficulties experienced under the present practice.

1489 POTTER, Commissioner, dissenting:

While the expressions of Commissioners Hall, Daniels, and Cox seem to me sufficient to condemn the conclusions of the majority report which are adverse to the use of assigned and private cars, the subject is of such importance that some elaboration may be justified.

Under the guidance of prevailing decisions, which I think we should follow, I accept the conclusion that paragraph (12) of section 1 of the interstate commerce act does not prohibit the use of assigned or private cars, even though pro rata distribution of all equipment is not observed and that we are authorized to sanction their use under proper restrictions. The question is whether under any circumstances and how they should be used where pro rata distribution is not observed. It is, perhaps, unfortunate that private cars for handling commercial coal and company and foreign railway-fuel cars are condemned together, for they are very different.

To my mind assigned and private cars perform essential functions which can not be accomplished without them. They are instrumentalities which can be used in correcting what is perhaps the most unsound condition in the industrial and commercial life. To forbid their use, if we have the power, will not be in the public interest.

In my opinion, if the majority report properly construes paragraph (12) of section 1, we have no authority to prohibit the advantages of assigned and private cars by requiring their pro rata distribution, although we may reasonably regulate their use. There is ample precedent for the use of the assigned and private car. In the early history of railroads all cars were owned by shippers. The charters of some railroads now obligate them to haul private cars. If a carrier desires so to do, there is nothing in the law which prohibits it, or gives us power to prevent it, from making proper arrangements, through tariffs if need be, with a view to hauling private cars for an appropriate charge so long as the same privilege is permitted to all and engaged in without unjust discrimination. Carriers have much latitude to determine how they will handle traffic, provided equal privilege is extended to all and all are subjected to the same rule. If a carrier elects to haul private cars, we can require that they be hauled for all who offer them. We can within reasonable limits restrict their use so as to require, for instance that coal cars serve a particular mine for a period of reasonable length in order to avoid market disturbance. We are without power, in my judgement, to say, as the majority report does in effect, that a private car can not be used at all except as a part of carrier equipment.

1490 There is public right and need to have railway fuel of high and even quality secured at the lowest cost. Assigned and private cars make for efficient and economical transportation. They promote regular mine operation, steady employment, reliable supply of coal of excellent quality to consumers, and low prices. If, under these circumstances, their use involves discrimination against some individual coal producers, such discrimination is in the public interest, is just, and should be supported. There is discrimination when cars are assigned to particular mines, but under existing conditions that discrimination is just and not unjust. There is discrimination always when, by common consent, anthracite coal is given a 100 per cent car supply. Where discrimination is just, it should be allowed. Only unjust discrimination is prohibited.

Carriers are not receiving the returns that the law contemplates, that fairness requires, and that the public interest demands as an encouragement to expansion and increase of carrier capacity. At the same time the country needs lower rates. Increased efficiency and reduced operating costs must be looked to for general rate reductions. Next to labor, coal costs are the highest item of operating expense. No agency should leave undone anything within the legitimate exercise of its powers to bring about a reduction of coal prices.

From every quarter there is demand upon the carriers for increased efficiency and reduced operating costs. At such a time we, the guardians of public and carrier interests, are compelling the carriers against their will to adopt practices which will impair efficiency and increase costs. It must be recognized that the railways are making supreme effort, with much success, to meet the demands upon them. They are now more efficient than at any prior time in their history. With fewer men they have in recent months exceeded all prior achievements. They have been handling tonnage in record volume so efficiently that there has been scarcely a murmur of complaint and so smoothly that their marvelous performance is scarcely noticed. Already superior in public service to every other system of transportation in the world, they are headed for better work in which there is promise that railway problems will disappear. We now come forward with condemnation of their economy, with directions that require disregard of the public interest and a policy of extravagance and waste.

The law authorizes regulation of transportation but not of the purchase of supplies, except in special instances not related to the car problem. Railways admittedly have the right to purchase fuel and other supplies where their judgment suggests. They require this right in order to obtain deliveries at points
1491 most convenient for use, economize haul and storage, avoid congestion, select fuel most desirable to meet varying conditions and power requirements, and promote efficiency and economy in general. Coals differ greatly in quality and condition, depending on the seams operated, methods of operation, and preparation, even as among mines on the same seam in the same locality. The percentage of carbon and volatile matter, firmness of texture or friability, and whether free or slow burning are important factors affecting efficiency and economy in coal use. The amount of dirt present because of bad roof or floor or partings or of careless mining methods is of importance; also whether the ash content is high or low, and the fusing point of ash—whether so high that the ash readily escapes through the grate or so low as to fuse, clog the grate, shut off draft, and cause delays and engine failures. The importance of these various factors depends very largely upon the conditions under which coal is used. For these reasons the quality and condition of coal which different roads can use with efficiency and economy depends upon their peculiar operating conditions and the traffic which they handle. On carriers of light traffic density, high percentage of level track, easy curves, and steady regular evenly sustained train movement, the fuel problems are much less serious than on carriers with greater traffic density, heavy grades, varying profile, high degree of curvature, demand for steam fluctuating greatly during short periods because of operating conditions, necessity for high speed, traffic congestion, frequent meetings, and numerous delays. The conditions under which coal is used in the fire box of a locomotive are more difficult than those to which coal is subjected in any other use. Grate

space is limited. Rapid conversion of heat units into available energy in small area is required, particularly under the severe conditions last mentioned. On a level railroad even steam pressure and even fires, making for efficient use of fuel, can be maintained. Under conditions of fluctuating power demand upon a locomotive, fuel consumption to maintain power sufficient for recurring periods of need means waste of fuel during intervals between. So on some carriers a free-burning coal with which steam can be generated quickly is desirable. Careful preparation, dependable quality, and condition are of great importance. Because of necessity for forced draft, quick burning, and rapid conversion of heat units, the percentage of loss in cinders through the stack and in unconsumed gases is greater in locomotives than under other boilers. As coal is used under a locomotive, less than 10 per cent of its heat units are converted into power available at the drawbar. The public interest requires that carirers select their coal with discrimination, and because
1492 of varying conditions general rules can not be applied to them. While under the law carriers have the right to buy all supplies, including coal, where they please, the majority report destroys this right by saying in effect that they shall not use their own cars to haul their fuel unless they distribute their purchases among all mines.

How will the rule of the majority report affect a railroad which is dependent for its fuel upon mines located on foreign lines, and requires during the year at a particular junction, say, 500,000 tons of coal? The natural course for such a buying road, considering its own best interests and acting in a sensible and businesslike manner, would be to select its coal from particular mines, having regard to quality, reliability of deliveries, and price, and place its orders among a few mines. If the equipment to handle the coal is to be furnished by the originating carrier, that carrier will be under obligation to make pro rata distribution of its equipment. The purchasing carrier can not know what would be the available equipment from time to time or how, in order to insure deliveries, its contracts should be distributed. Shortage in deliveries would subject it to the uncertainties of the spot market and it would have to increase its price when coal is in demand. The sensible course would be for such a buying carrier to furnish its own equipment in which to haul its coal. But, if this course were followed, all cars in excess of the general percentage distribution would have to stand idle. That would defeat the purpose for which the foreign line provided the equipment, and knowledge that such a practice would be followed would naturally deter foreign lines from purchasing equipment, although present conditions demand such purchases. Commissioner Hall points out what recently happened to such a carrier. It is likely to happen to any carrier at any time, and certainly will happen often.

Coal contracts generally contain provisions to the effect that the producers are not responsible for delays due to car shortage and

strikes, thus exposing the buyer to these serious contingencies. A mine may have capacity for an output of 50,000 tons per month. One about to contract for coal, judging from past experience, would conclude or guess upon a 50 per cent car supply or an actual output of 25,000 tons per month. Any reduction below this figure in the actual output because of car shortages which could not be foreseen (and they always occur) would result at best in a pro rata reduction of deliveries under all contracts. A consumer dependent upon a pro rata delivery of cars can not possibly foresee what deliveries will be. If coal must be had regularly, the consumer must go into the spot market unless he has available for his use assigned or private cars over which he has absolute control. Railroads and
1493 public utilities are such users. The fact that there is in the country an enormous surplus of developed and equipped mines beyond the need makes reliability of car supply impossible so long as cars must be prorated. In times of increased demand output is increased and calls for coal cars are increased. Unless cars are assigned, the available equipment must be distributed according to the traffic offered for shipment. No one can foresee what traffic at any particular time is to be offered, and no one can anticipate what the car supply will be. Ownership by foreign lines of cars sufficient to insure delivery of their coal supply and the right to restrict their use is essential to protect carriers against a fuel shortage, insure the observance of contracts, and the purchase of coal at advantageous prices. The mere purchase of cars by foreign lines without their assignment will not afford protection, for they would have to go with the general pool.

It is well known that mines assured of continuous operation favorable for low production costs will contract at lower prices. Opponents of the assigned and private car object to that desirable result. In order to maintain unhealthy and uneconomic conditions in the coal-mining industry they contend that they should have a part of the order of the buying road at high prices, although the interests of the general shipping public, which pays the carrier's coal bill, requires low fuel prices. The opponents of the private and assigned car demand that the interests of the many be sacrificed for the interests of the few, and we have sustained them. Such is the gist of this entire controversy. Instead of prohibiting assigned and private cars their use should be encouraged. The greater the number of assigned and private cars properly used and the fewer the mines at which they are placed, the better for all concerned. If many shippers would provide their own cars, the carrier equipment available for others would be greatly increased, and the price of coal would drop. If this commission would announce the right of shippers to use private cars in their own service, reasonably regulated to restrict their use to particular mines for long periods, and that as thus used they would be protected, private capital would promptly come to the aid of the carriers and provide private cars to an extent which

would insure ample equipment for all, reduce coal shortages to a minimum, and serve the public interest in a vital way.

The interstate commerce act gives us emergency powers. It licenses as a necessary evil the abomination of priority orders. Whenever there is a coal shortage we are required to resort to these powers in the interest of carriers, public utilities, hospitals, etc., which everybody recognizes must under all circumstances
1494 have fuel. Cars dealt with in emergency orders are withdrawn from general use at times when most needed. So used they cause confusion and disturb the market. With permission and protection for private cars, their use would be known and be counted upon and would affect no one injuriously. The shipping public stands ready to augment the general car supply and eliminate the necessity for emergency priority orders largely if not entirely. The majority report requires continuance of the abomination. Whenever because of car shortage it is thought that the assigned car would hurt we will have to at that time come forward and do more harm with an emergency order.

Railways and public utilities which consume coal in large quantities in times of shortage are recognized as entitled to preferential treatment. Now, in times of emergency they are placed ahead of the general public. If given permission to do so, they will so equip themselves that they can be considered last. It would seem obvious that in the public interest the policy of efficiency and economy enjoined by law requires that consuming carriers provide equipment for their fuel, and that such equipment be devoted to their use at such mines as in the exercise of good business judgment should be selected as best suited. The majority report forbids this sensible businesslike practice. The statement in the majority report regarding the experience of the New Haven Railroad in the purchase of spot coal on the one hand and the use of the assigned car to take coal under contract on the other is strong condemnation of the conclusions at which the majority report arrives.

The majority report ignores the aspect of the assigned and private car as a storage facility. Admittedly a carrier is at liberty to provide itself with facilities for the storage of coal, and such is the carrier's duty within reasonable limits. Vast expenditures would be required to establish facilities to store coal in considerable quantities at various points. There are no regular periods of surplus, and too much storing would convert periods of surplus into periods of shortage. Costs of handling fuel in and out of storage are substantial. Much coal thus stored would require removal to other points for consumption. The most economical storage facilities, all things considered, up to a certain amount, are bins containing from 50 to 100 tons, with wheels under them, to facilitate prompt and economical handling and movement as required. While the carrier is at liberty to install inefficient and inconvenient stationary storage bins,

the majority report denies the right to provide storage bins on wheels (cars) if such are to be sent to the mines for coal and used to
1495 transport coal from the mines, even though such use would add to the available equipment and to that extent release cars for other commercial use.

Just how industry will get along without the private car it is difficult to see. The common carrier and the public utility can be taken care of after a fashion through emergency orders, but at great inconvenience and expense to everyone else. Not so with a private industry. Take, for illustration, a large steel plant, upon the continuous operation and financial success of which many thousands are dependent for employment and more thousands are dependent for low-priced commodities produced at low cost. Such an industry may use a thousand tons of coal and coke per day and require deliveries every day. Economy and certainty of fuel constantly suggest that it control its source of supply. It operates its own mines and coke ovens, which are 10, 50, or hundreds of miles away. Fluctuating demand on carrier equipment and uncertainty of carrier supply have compelled it to buy cars, which the railway hauls back and forth. It now enjoys continuous operation. The majority report says that no matter how many cars the industry has it can not use any greater percentage for its requirements than the railway is able to furnish to all mines on its line for their requirements. Its extra cars must stand idle or it must divide all of its cars among all mines on the carrier's line and itself take only a pro rata share. The number of its own cars that it may use will not depend upon its own need but upon the need of others. When there is only a 50 per cent car supply for other mines, it must reduce its operation 50 per cent and shut down half of the time. Labor must be thrown out of employment, manufacturing costs must soar, and the whole country must suffer, because there are too many mines, and in order that mines that ought not to exist may continue to live at public expense. Seemingly, if the rule is to apply to coal, it must apply to other things and cars used for other supplies must be surrendered to the general pool.

We might well consider the effect of the rule of the majority report upon an industry like the Ford Motor Company, which employs, I believe, something like 70,000 men, and which, because of its efficiency, is able to pay high wages and produce at low costs. It might well be that such an industry would find that steady employment of its men and their scale of wages and the low cost and selling price of its output would be imperiled by an uncertain car supply, increasing fuel costs, and unsatisfactory quality of available coal. (General information now current suggests the use of the Ford Motor Company as an illustration.) Good management in the interest of all concerned would suggest the acquisition of coal mines and the
1496 application of methods of high efficiency in their operation. The use of private cars assigned to particular mines would seem

to be indispensable. The majority report bars them. It supports coal operators who would force the Ford Company to buy coal that would not suit its purpose and pay high prices because of high costs which Ford management would reduce. It says that inefficient mines which should not exist must be supported at the expense of the Ford Company, its employees, and the purchasers of its product. This illustration is typical of what the majority report will do throughout the entire industrial world.

Under the majority report railways having mines on their own lines can not use their own cars to protect their coal supply, and if there is only a 50 per cent car supply for all, they may have only 50 per cent of their requirements. They too, must shut down in times of shortage or depend on storage, which in large quantities beyond a reasonable point can be accomplished only at great cost. Similarly, if we are consistent, cars used for other supplies, such as for ballast, must be prorated, even though maintenance work must stop. The only escape from these results is through confiscation or emergency orders, which at best would interfere with the car supply for mines generally more than would cars regularly assigned, and which the commission has heretofore consistently condemned.

There is another aspect of the assigned and private car more important, it seems to me, than all the rest. So far little consideration has been given to what is the basic vice in the whole coal situation. We have within our reach and subject to our will one of the roots of economic and industrial disturbance. With opportunity to uproot the evil, the report nurtures it and attempts only to find a way to get along in spite of it. We should destroy it, and the assigned and private car will help to do it.

The conditions which prevail in the bituminous-coal industry have been going steadily from bad to worse during the last decade. They are a wasteful burden on economic life and breed discontent in our social order. Responsibilities are so scattered and faults are so widespread that individual endeavor can not supply a remedy. The allurements of profits have led to gross overexpansion. With national need for about 10,000,000 tons a week, the capacity of developed and equipped mines is more than 20,000,000 tons per week. The investment in development and equipment and all that goes with mining operations is more than twice the need if the industry were carried on so as best to serve the public interest. Excess capacity beyond what the market demands means idleness in the same ratio of mines, equipment, and men. An excess investment of more than 100 per cent would bring ruin to any other enterprise.

All of the excess burdens are distributed over the actual output of running time and are borne by the consumer in the price he pays for coal. Profits have not been great, as a rule, in coal production, and with reasonable production costs would not make the selling price excessive. High coal prices are due mainly to excess production costs, which are caused by the excess capacity developed, maintained, and operated.

Not only are mines developed and equipped to produce 20 million tons of coal a week but men sufficient to mine 20 million tons of coal per week are being supported by the industry. Mines can not run full time because 11 or 12 million tons of coal a week for a considerable period would glut the market. They therefore run only two and three days per week. In order to support men working on half time costs per ton have so increased that mine wages are out of all proper relation to wages paid on the farms and by railroads and other industries. Common laborers make $7.50 per day, loaders make from $15 to $18 per day, runners of cutting machines make from $18 to $20 per day, runners of gathering locomotives make from $18 to $20 per day. The result is that to produce coal is costing upward of $2 per ton, whereas 10 years ago it was costing about 75 cents per ton.

Millions upon millions are being spent to provide additional mining capacity in face of the fact that every mine opened and every ton of additional capacity developed makes matters worse. No check is being applied. The sedatives of price fixing, zoning, and regulated distribution have been administered, but they do not reach the trouble. Reduction of high coal-production costs is a public necessity. A proper reduction of producing costs to a normal level should make a direct saving to the country in the price of coal of from $500,000,000 to $750,000,000 per year and much additional indirect saving. An amount equivalent to a contribution of perhaps upward of $10 per annum by every man, woman, and child in the country is being handed over to the coal producers in order to maintain mine employees as a favored class and mine operations as a favored industry.

Costs and selling prices can be brought down through control of transportation. If transportation were available to handle 11 or 12 million tons of coal steadily the surplus of available coal would break prices by forcing competition among producers, would close up high-cost mines, concentrate activity in 50 or 60 per cent of the mines, furnish steady employment at fair wages to the right number of men who should be engaged in coal mining and release the
1498 surplus for other industries where they are needed, reduce transportation cost, and break the vicious circle of high prices. A surplus of 10 per cent above the market demand for any article of commerce represents the difference between a price-raising shortage and a price-lowering surplus. A sustained surplus of coal will bring reduction. Everything is favorable for that surplus except transportation.

Increased available transportation can be obtained only through the acquisition of additional equipment or by increasing the efficiency with which existing equipment is handled. The question as to whether carriers should provide additional equipment is involved in another proceeding which is pending before us. At the present time they are making unparalleled expenditures to better equip themselves

to render service. There is doubt whether it is to [illegible] interest to increase their investment in coal cars and whether the public which in the end pays the carrying charges can afford to have them do so.

It would seem that railways should not be expected to do more than take care of the transportation demands of industry and commerce as normally carried on. As thus carried on, need for transportation can be foreseen and reasonably met. Railroads are not responsible for the uncertainties and fluctuations in the demands of the business world for transportation. They should not be expected to be ready to move all traffic promptly during abnormal periods of transportation demand following abnormal periods of inactivity, as where a coal strike has prevented the shipment of coal which carriers were ready to haul. It would not be in the public interest that carriers at all times be equipped to handle abnormal peak loads. Sufficient facilities to handle promptly at all times the tonnage offered would mean an enormous investment that would be idle most of the time. The carrying, maintenance, and depreciation charges would be too high for a legitimate business enterprise to stand and the rates that would be required would be prohibitive.

Transportation is a step in the process by which agriculture, manufacture, and commerce carry on the national industry. Its cost is a part of the nation's operating expense. Shippers pay for it and the greater the cost the greater the shippers' burden. Therefore, the interests of all demand an efficient transportation machine wisely constructed and economically operated. Obviously the most efficient operation is continuous regular operation evenly distributed throughout the year. The coal movement under normal conditions is spread fairly evenly over the 12 months, although a little more than half the annual movement is transported in little less than 1439 half the time. Ten million tons a week will take care of consumers' demands. With moderate provisions for storage consumers can, without any unreasonable burden, take deliveries evenly distributed over the year of approximately 10 million tons a week. The railways with their present equipment kept in good order can handle efficiently and economically 10 million tons per week. Considering, therefore, only the volume of coal necessary to meet consumers' needs, the carriers are now fairly well equipped to handle that volume moving under normal conditions. It is difficult then to see why, in justice to the carrier and in justice to the shipping public as a whole, which carries the burden, there should be enlargement of carrier facilities to meet abnormal conditions for which the carriers are not responsible. Logically, those at fault for abnormal conditions should pay for the inconvenience which they cause. In other words, the coal industry and not the railways should be held responsible and the troubles should be laid at the door of the coal producers, not the carriers. The real trouble with the coal situation is that there are too many mines in operation.

Increased efficiency in the use of existing equipment rather than more equipment is the urgent need. One way to bring it about is by revision of the rate structure and another way is by the increased use of assigned and private cars. Much that is wrong in the coal situation is due to following unsound methods in rate making, over which we have control and for which we are responsible. Abnormally low rates on long hauls are much to blame. Considerable can be done through cautious revision of the rate structure to remove unnatural adjustment with due regard for all entitled to consideration. Increased utilization of short-haul mines would increase efficiency and reduce costs in both mining and transportation. But that problem is not here. There is here the problem of car distribution—use of the assigned and private cars.

It must be borne in mind that we have just as much power to authorize and approve unequal distribution as we have to require equal distribution. The majority report recognizes that the law does not require equal distribution but contemplates that conditions may require unequal distribution. The power is left with us to authorize what, all things considered, we deem just. Only unjust discrimination is to be condemned. Public interest now requires discrimination in the use of cars and that they be assigned to particular mines. Equal distribution among all mines which the majority report requires is exactly what should not be had. What the country and the consumers of coal really require is an unequal distribution which will give the public the benefit of the economical low-cost
1500 mines and not compel them to support uneconomical high-cost mines. A sort of zoning is what is needed, perhaps more now than in war times. The proper use of the assigned and private car is a sound, sensible, businesslike method of zoning. Expectation of equal distribution, even more, perhaps, than an unsound rate structure, has brought about the undue expansion in coal production. If the use of cars had been properly restricted, half of the existing mines would not exist. The majority report will make bad conditions worse. Under it the expansion hostile to the public interest may go on, justified, encouraged, supported, and unchecked.

Some people seem to be overlooking the fact that industry generally does not function for the benefit of mines. Consumption does not take place for the purpose of keeping mines in operation. Fuel is produced for consumption, not consumed for production. It is the public consuming need and not the private producing need that justifies the industry and consumers' rather than the producers' rights are to be considered first. Consumers have the right to demand efficient and economical production and transportation.

No industry that tolerates unnecessary expense should expect to prosper, and the coal industry could not survive if it were not able to pass on to consumers the consequences of the industry's mismanagement. The industry should clean house. Many want to clean house. They can not do it alone. We have the power to assist the worthy and compel the unworthy through revision of the rate

structure and the extended use of the assigned and private car. We should do what the consumers' interests require and almost, it might be said, forget the producer. We should construe the law as directing us to require the use of equipment as public interest demands to best serve the fuel need.

The immediate answer to the problem is the assigned and private car. They will bring about continuous operation of efficient mines at low cost. There are many concerns which, if permitted, will furnish private cars. It has been brought to our specific attention that this is true of distributors in New England. Permit them the use of the private car and the New England coal problem will lose its serious aspect and the coal bill will be reduced. Many public utilities throughout the country using large quantities of coal would operate their own mines or contract for entire mine output, thus insuring dependable supply and continuous operation at low cost. Men would drift to mines thus continuously operated, which is what should take place. High-cost mines would have to shut down, and that is exactly what the existing situation calls for.

1501 Every dollar that the private shipper puts into cars saves just that much railroad burden and to that extent serves the public interest by reducing the public's cost of carrying the railroads. Many consumers and shippers can afford to invest in private cars, because they will make savings that will compensate them. The ownership of cars does not place a burden on the consumer, but, in fact, lifts it. The saving in the cost of coal production will more than offset the investment in cars.

Nor does the use of private cars discriminate in any real sense against the coal producer. He is entitled to equal distribution of all of the railway equipment except as the carrier needs to use its equipment preferentially for fuel with which to serve all shippers. He is entitled to have the carrier equip itself with that reasonable amount of equipment which a carrier should own. He is not entitled to ask the carrier to provide an abnormal excessive amount to overcome the consequences of bad management of the coal industry. In addition to the equipment which a carrier should own, the equipment to handle abnormal peak loads should be provided by shippers, and they will gladly provide it if given permission. Let each producer have his full share of company equipment, but let private producers furnish additional cars for their exclusive use, provided they are used continuously at particular mines and not shifted around from place to place for the purpose of breaking prices. I am not certain but that the shifting would be a good thing if it would result in breaking prices. The point I make, however, is that the mine operator is not entitled to any more than his share of the carrier's equipment. He is not entitled to say that no shipper shall own private cars without sharing them with all others.

The claim that the railways are to blame for high wages and other mine costs, because they do not furnish cars for continuous

operation, has no foundation. The mines alone are to blame, because of their excessive number. If they could increase production they could not market it. If there were a full car supply for everyone, no more coal would be sold and the mines would be just as bad off as they are to-day. The only effect of an increased car supply would be to reduce prices by increasing competition for the consumers' market. The problems are commercial. For them the mines are to blame, and not transportation, for which the railways are responsible. More cars in the aggregate is what the mines do not want. What they want is to compel buyers to distribute their orders. There would be just as much logic in demanding that carriers so distribute the purchases of all materials and supplies, and, in fact, that all consumers distribute all their purchases among all producers.

1502 Perhaps I have gone outside of the record in discussing this case. I do not agree with the statement in the majority report that we are confined to the record in the sense that we must make a report in accordance with it. This proceeding is an investigation upon our own motion. The burden is upon us to make a proper record. An insufficient record does not justify an unsound decision. It is a duty to go outside of the record, if need be, in order to protest against the record and an improper decision based upon it.

While the Congress, executive officials, and all sorts of committees and commissions are trying to find a way to correct the evils in the bituminous-coal world and break the vicious circle of high prices, it seems to be overlooked by everyone, including ourselves, that we have real power with which we can do something. We know what should be done and are in position to do it. In our treatment of the assigned and private car we are throwing away an important portion of our power. In what we would be required to do to get results, no invasion of any right would be involved and no serious question would arise. We would interfere with no one and discriminate against no one. All we need do is to permit all shippers who want them to possess and use private cars in carrying on their own business. With this right recognized and protected, the coal world itself would remedy the evils.

Cox, Commissioner, dissenting:

I am unable to concur in the finding of the majority that the present practice of assigning private cars and system or foreign-line cars for railroad fuel to coal mines is unreasonable or unduly prejudicial, and I find justification for the following dissenting opinion from a recital of facts from the majority report.

It is generally recognized that nothing is more important to our industrial development or national prosperity than the transportation systems of our country, and one of the important factors in the efficient and economical operation of the railroads is the question of a regular and certain supply of railroad fuel at reasonable prices. It has been stated that the assigned car enables the carrier to secure

a regular and uniform supply of fuel, permits the placing of contracts for yearly consumption at reasonable prices, makes confiscation unnecessary, and does not force the carrier into the spot market for its fuel, which necessarily increases the price not only to the carrier but to the consuming public as well.

On page 535 of the majority report, the following appears:

"It is recognized that the importance of the railroads in the distribution of coal and other commodities, and their general dependence upon bituminous coal in producing transportation, requires
1503 that in some lawful way they may be assured of a steady supply of suitable coal. It is likewise generally admitted that, whatever means are adopted to secure such supply, emergencies will occur when the supply will fail unless the railroad is enabled by some means within the law to take sufficient coal ahead of less necessitous uses to keep the flow of traffic going as the public interest requires. There is no dissent from the proposition that confiscation of fuel coal by railroads is a practice to be avoided. It seems to be generally accepted that the public interest requires that the carriers shall not be subjected to unreasonable prices.

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"There is enough bituminous coal in the ground in this country to more than supply the demands of all consumers for a long period. There are more than enough miners to produce coal for all purposes. There are more mines than is consistent with the most efficient use of equipment, and their aggregate capacity exceeds greatly the country's demand. * * * The aggregate time lost because of car shortages, local and general, is a considerable proportion of the whole of any recent elapsed period of time. And during each period of car shortage the practical problem of supplying the railroads with fuel has been presented sharply, and the meeting of the problem has been most troublesome, and has necessarily involved considerable general disturbance of production and transportation."

And again, on page 537:

"The president of the railroad company testified that the assigned cars were essential for the following reasons: (1) They gave the carriers a regular and certain supply of coal in times of car shortage, (2) the coals from different fields are not of the same grade, which requires that certain adjustments be made in the locomotives. The Alabama coal is a different grade from that mined in southern Illinois, and again, the coal in different counties in Illinois has different burning qualities. (3) Unless the carriers can contract for a regular and suitable supply of coal, resort to confiscation becomes necessary. (4) Going into the spot market would increase the price of coal, not only to the carrier but to the consuming public as well."

Page 538:

"The assigned car, the New Haven claims, enables it to secure a uniform quality and grade suitable for its requirements and favorable to good service; permits the placing of contracts for yearly

consumption at reasonable prices; requires the use of a minimum number of cars on consuming line in its fuel service; results in an increase in the number of cars available for commercial loading; reduces unloading costs, as the unloading facilities and types of cars are each adapted to the other; affords a greater opportunity for solid train movement of empties and loads; and affords a better standard of maintenance and equipment on account of system cars being more regularly at home."

Page 539:

"A plan has been worked out through the use of the assigned car whereby coal produced in a certain territory will go to the same divisions continuously, and this, it is urged, results in increased efficiency. Any change in the assignment of coal lowers the efficiency of the motive power. With the assigned car the Baltimore & Ohio used an average of about two grades of coal on a division. During the strike period in 1922 it was necessary to use about 18 to 20 different grades, and the performance of the motive power was unsatisfactory."

1504 Page 546:

"If a foreign carrier were not permitted to assign its own cars to a coal-loading carrier, the latter would be under the primary duty of supplying cars at the mines. There would follow a reduction in the supply available for the commercial mines, because of the necessity for spreading the cars that were at hand over a wider field. * * * For that reason the carriers claim that such cars are a distinct advantage to the commercial operator."

Page 551:

"Mine operators prefer to have the assurance that cars will be furnished for railroad fuel coal, and a promise of this character is one of the factors which influences the making of the contract. If the operators do not have this assurance, there would be a higher price."

Page 558:

"Under the impetus of the war demand for coal and prolonged coal-car shortages, the ownership of private coal cars increased. There can be no doubt the incentive was the more regular and larger car supply provided under the operation of the assigned-car practice."

Page 559:

"It is abundantly made clear from the record that as competition becomes more keen more and more the public utilities, steel producers, manufacturers of by-product gas, automobile manufacturers, certain chemical manufacturers, glass works, and other industries likewise absolutely dependent upon a steady supply of coal, rather than face ruin each recurring coal-car shortage, will be compelled to acquire private cars which they may have assigned."

I can not consistently condemn a rule or policy which in its application lends itself to the more efficient and economical operation of both mines and railroads and which in time of emergency must

of necessity be applied in order to meet the urgent and imperative needs of the carriers and public utilities particularly, and of the public generally.

1505 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of June, A. D. 1923

No. 12530

In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

The Algoma Central & Hudson Bay Railway Company; Algoma Eastern Railroad Company; Apalachicola Northern Railroad Company; Angelina & Neches River Railroad Company; Alton, Granite & St. Louis Traction Company and F. E. Allen, Receiver; Alton, Granite & St. Louis Traction Company and W. H. Sawyer, Receiver; Arcade & Attica Railroad Corporation; Aroostook Valley Railroad Company; Ashland Coal & Iron Railway Company; Augusta & Aiken Railway Company; Batesville Southwestern Railroad Company; The Belt Railway Company of Chicago; Benton Harbor-St. Joe Railway & Light Company; Big Sandy & Kentucky River Railway Company; Birmingham, Columbus & St. Andrews Railroad Company and A. D. Campbell, Receiver; Blytheville, Burdette & Mississippi Railway Company; Buffalo & Susquehanna Railroad Corporation; Cairo, Truman & Southern Railroad Company; The California & Oregon Coast Railroad Company; Central New York Southern Railroad Corporation; Central Railway Company of Arkansas; Chicago & Illinois Midland Railway Company; Chicago, Lake Shore & South Bend Railway Company; Chicago, Terre Haute & Southeastern Railway Company; Chicago & Western Indiana Railroad Company; Chicago, Peoria & St. Louis Railroad Company and B. Wilson, Receiver; Chicago, Peoria & St. Louis Railroad Company and W. Cotter, Receiver; Cleveland, Southwestern & Columbus Railway Company; Clinton & Oklahoma Western Railroad Company; Clinton, Davenport & Muscatine Railway Company, Combs, Cass & Eastern Railroad Company; Crittenden Railroad Company; The Dayton & Troy Electric Railway Company; Deep Creek Railroad Company; Detroit & Mackinac Railway Company; Detroit, Bay City & Western Railroad Company; Detroit, Toledo & Ironton Railroad Company; The East Jordan & Southern Railroad Company; East St. Louis & Carondelet Railway Company; East St. Louis & Suburban Railroad Company; East St. Louis Belt Railroad Company; The East St. Louis Connecting Railway Company; East St. Louis Railway Company; El Paso Southern Railway Company; Erie & Michigan Railway & Navigation Company; The Fairport, Painesville & Eastern Railroad Company; Fonda, Johnstown & Gloversville Railroad Company; Fort Wayne & Northwestern Railway Company; The Denver & Salt Lake Rail-

road Company and W. R. Freeman, Receiver; The Denver & Salt Lake Railway Company and C. Boettcher, Receiver; The Glady & Alpena Railroad Company; Granite City & Madison Belt Line Railroad Company; The Gulf & Sabine River Railroad Company; The Hagerstown & Frederick Railway Company;
1506 The Illinois Southern Railway Company; Illinois Transfer Railroad Company; The Indianapolis & Louisville Traction Railway Company; International Railway Company; Interstate Car Transfer Company; Interstate Public Service Company of Indiana; Indiana Railways & Light Company; Kalamazoo, Lake Shore & Chicago Railway Company; Kanawha, Glen Jean & Eastern Railroad Company; Kane & Elk Railroad Company; Kansas City, Clay County & St. Joseph Railway Company; Kelly's Creek Railroad Company; Lake Erie & Fort Wayne Railroad Company; Lake Providence, Texarkana & Western Railroad Company; Leetonia Railway Company; Lehigh & Hudson River Railway Company; Lime Rock Railroad Company; Louisiana Railway & Navigation Company; Louisville & Southern Indiana Traction Company; Macomb, Industry & Littleton Railway Company; Missouri & Northern Arkansas Railroad Company and C. A. Phelan, Receiver; Madison, Illinois & St. Louis Railway Company; Manufacturers Railway Company (of St. Louis); Manistee & Northeastern Railroad and The Michigan Trust Company, Receiver; Marinette, Tomahawk & Western Railroad Company; Mariana & Blountstown Railroad Company; Miami Mineral Belt Railroad Company; Michigan Ammonia Works; Missouri & Illinois Bridge & Belt Railroad Company; Monson Railroad Company; Mount Hood Railroad Company; Muskogee Electric Traction Company; Nevada Copper Belt Railroad Company; Nevada Transportation Company; Oil Fields Short Line Railroad Company; The Oklahoma, New Mexico & Pacific Railway Company; Pacific & Arctic Railway & Navigation Company; Pajaro Valley Consolidated Railroad Company; Paris & Mount Pleasant Railroad Company and W. H. Wortham, Receiver; Petaluma & Santa Rosa Railroad Company; Rio Grand & Eagle Pass Railway Company; St. Joseph Belt Railway Company; St. Louis & Belleville Electric Railway Company; St. Louis & East St. Louis Electric Railway Company; St. Louis & O'Fallon Railway Company; St. Louis Belt & Terminal Railway Company; St. Louis Bridge Company; St. Louis, Kennett & Southeastern Railroad Company; St. Louis Merchants Bridge Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis Terminal Railway Company; St. Louis Transfer Railway Company; The St. Louis, Troy & Eastern Railroad Company; Salt Lake & Ogden Railway Company; The Santa Fe, Raton & Eastern Railroad Company; Sardis & Delta Railroad Company; Savannah & Atlanta Railway Company; Sewell Valley Railroad Company; Sheffield & Tionesta Railway Company; Sioux City Terminal Railway Company; South Georgia Railway Company; Southern New York Power & Railway Corporation; Sumpter Valley Railway Company; Susquehanna & New York Railroad Company; Tennessee,

Alabama & Georgia Railroad Company and C. Hicks, Receiver; Tennessee, Kentucky & Northern Railroad Company; Terminal Railroad Association of St. Louis; Terminal Railroad of East St. Louis; The Texas Company; Tidewater & Southern Railway Company; The Toledo & Western Railroad Company and J. F. Johnson, Receiver; The Toledo & Western Railroad Company and H. A. Dunn, Receiver; The Toledo, Angola & Western Railway Company; The Toledo, Bowling Green & Southern Traction Company; Trona Railway Company; Tunnel Railroad of St. Louis; Tionesta Valley Railway Company; The Union Depot Company of St. Louis; The Union Railway & Transit Company of Illinois; Upper Merion & Plymouth Railroad Company; Utah-Idaho Central Railroad Company; Washington, Idaho & Montana Railway Company; Washington Coal & Coke Company;
1307 Waycross & Southern Railroad Company; West Chester, Kennett & Wilmington Electric Railway Company; Western Allegheny Railroad Company; Western Chemical Manufacturing Company; Western Ohio Railway Company; The Western Pacific Railroad Company; Wheeling Traction Company; Wichita Falls, Ranger & Fort Worth Railroad Company; Wiggins Ferry Company; Willamette Valley Southern Railway Company; Wilkes-Barre & Hazelton Railway Company; Wisconsin & Michigan Railroad Company; Wyoming & Missouri River Railroad Company; Yakutat & Southern Railway Company; Central Indiana Railway Company; River Terminal Railway Company; St. Louis Bridge & Terminal Railway Company; Munising, Marquette & Southeastern Railway Company; Lake Superior & Ishpeming Railway Company; Ann Arbor Railroad Company; Atlantic Port Railway Company; Baltimore & Cumberland Valley Railway Company; Baltimore & Cumberland Valley Railroad Company; Baltimore & Cumberland Valley Railroad Extension; Baltimore & Harrisburg Railway Company; Baltimore & Harrisburg Railway (Eastern Extension); Baltimore & Harrisburg Railway (Western Extension); The Beaumont, Sour Lake & Western Railway Company; Benwood & Wheeling Connecting Railway Company; Bessemer & Lake Erie Railroad Company; Birmingham Southern Railroad Company; Brownsville & Matamoras Bridge Company; Canton Railroad Company; Chicago & Calumet River Railroad Company; Chicago & Eastern Illinois Railroad Company and W. J. Jackson, Receiver; Chicago & Illinois Western Railroad; Chicago & Kenosha Railway Company; Chicago & Southeastern Railway Company; Chicago, Lake Shore & Eastern Railway Company; Chicago, Milwaukee & Gary Railway Company; Chicago, North Shore & Milwaukee Railroad; Connellsville & Monongahela Railway Company; The Denison & Pacific Suburban Railway Company; Denver & Rio Grande Railroad Company and A. R. Baldwin, Receiver; Donora Southern Railroad Company; The Duluth & Iron Range Railroad Company; The Duluth & Northern Minnesota Railway Company; Duluth, Missabe & Northern Railway Company; Elgin, Joilet & Eastern Railway Company; Elwood, Anderson & Lapeile Railroad Company; Etna & Montrose Railroad Company;

Hannibal Bridge Company; Houston & Brazos Valley Railway Company and G. C. Morris, Receiver; Hudson & Manhattan Railroad Company; Interstate Utilities Company; Johnstown & Stony Creek Railroad Company; Joliet & Blue Island Railway Company; The Lake Terminal Railroad Company; Louisiana Southern Railway Company; Louisville, New Albany & Corydon Railroad Company; McKeesport Connecting Railroad Company; The McKeesport Terminal Railroad Company; Manistique & Lake Superior Railroad Company; Meadville, Conneaut Lake & Linesville Railroad Company; Mercer Valley Railroad Company; Milwaukee, Bay View & Chicago Railroad Company; Monongahela Southern Railroad Company; Morristown & Erie Railroad Company; Newburgh & South Shore Railway Company; The New Castle & Lowell Railway Company; New Iberia & Northern Railroad Company; New Orleans, Texas & Mexico Railway Company; Northern Liberties Railway Company; Opelousas, Gulf & Northeastern Railway Company and W. H. Peterman, Receiver; The Orange & Northwestern Railroad Company; Pencoyd & Philadelphia Railroad Company; Pere Marquette Railway Company; Pittsburgh & Ohio Valley Railway Company; Pittsburgh, Allegheny & McKees Rocks Railroad Company; Pittsburgh, Bessemer & Lake Erie Railroad Company; Pennsylvania Ohio Power & Light Company; Pennsylvania Ohio Electric Company; Prattsburgh Railway Corporation; The Rio Grande Southern Railroad Company; St. Clair
1508 Terminal Railroad Company; St. Louis Southwestern Railway Company; St. Louis, Brownsville & Mexico Railway Company; St. Louis Southwestern Railway Company of Texas; Sharon Connecting Railroad Company; The Sharon & New Castle Street Railway Company; The Sharon Railway; Slackwater Connecting Railroad Company; Southwestern Gas & Electric Company; The Texas & Pacific Railway Company and J. L. Lancaster, Receiver; The Texas & Pacific Railway Company and C. L. Wallace, Receiver; Trans-Mississippi Terminal Railroad Company; Union Railroad Company (Pensylvania); Western Maryland Railway Company; Youghiogheny Northern Railway Company; The Youngstown & Northern Railroad Company; Arkansas Central Railroad Company; Coal Belt Electric Railroad; Fort Smith Suburban Railway Company; Iron Mountain Railroad of Memphis; Little Rock Junction Railway; Marion & Harrisburg Railway Company; Marion & Johnstown City Railway Company; Missouri Pacific Railroad Company; Missouri Pacific Railroad Corporation in Nebraska; Natchez & Louisiana Railway Transfer Company; Natchez & Southern Railway Company; Union Railway Company (Memphis); International & Great Northern Railway Company and J. A. Baker, Receiver; Addison & Susquehanna Railroad Company; Barre & Chelsea Railroad Company; Belfast & Moosehead Lake Railroad Company; Boston & Albany Railroad Company (The New York Central Railroad Company, Lessee); Boston & Maine Railroad; Bridgeton and Saco River Railroad Company; The Buffalo Creek Railroad Company;

Buffalo & Lake Erie Traction Company and G. Bullock, Receiver; The Central Union Depot & Railway Company of Cincinnati; Chester & Becket Railroad Company; Chicago, Kalamazoo & Saginaw Railway Company; The Cincinnati Northern Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Coos Valley Railroad Company; The Dayton Union Railway Company; Delaware, Susquehanna & Schuylkill Railroad Company; Detroit Terminal Railroad Company; Dexter & Newport Railroad Company; Dexter & Piscataquis Railroad Company; Eastern Maine Railroad Company; Eastern & Northern Railroad Company; European & North American Railway; Evansville, Indianapolis & Terre Haute Railway Company; Fort Wayne, Cincinnati & Louisville Railroad Company; Fulton Chain Railway Company; Indiana Harbor Belt Railroad Company; Jersey City Belt Line Railroad Company; The Kanawha & Michigan Railway Company; Kanawha & West Virginia Railroad Company; The Lackawanna & Montrose Railroad Company; Lake Erie, Alliance & Wheeling Railroad Company; The Lake Erie & Western Railroad Company; Lehigh Valley Railroad Company; Lehigh Valley Railroad Company of New Jersey; Louisville & Jeffersonville Bridge & Railroad Company; Loyalsock Railroad Company; Maine Central Railroad Company; The Michigan Central Railroad Company; Montpelier & Wells River Railroad; Newark Bay Railroad Company; New York & Ottawa Railway Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; Ottawa & New York Railroad Company; The Peoria & Eastern Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Pittsburg & Shawmut Railroad Company; The Portland & Ogdensburg Railway; Portland & Rumford Falls Railroad; Portland & Rumford Falls Railway; Portland Terminal Company; Raquette Lake Railway Company; Rumford Falls & Rangeley Lakes Railroad Company; Rutland Railroad Company; St. Johnsbury & Lake Champlain Railroad Company; St. Joseph, South Bend & Southern Railroad Com-
1509 pany; St. Lawrence & Adirondack Railway Company; Sandy River & Rangeley Lake Railroad; The Schuylkill & Lehigh Valley Railroad Company; The South Buffalo Railway Company; Sullivan County Railroad; The Sussex Railroad Company; The Syracuse, Binghamton & New York Railroad Company; The Toledo & Ohio Central Railway Company; The Toronto, Hamilton & Buffalo Railway Company; The Troy Union Railroad Company; Upper Coos Railroad Company (New Hampshire); Upper Coos Railroad Company (Vermont); Vancouver Traction Company; Vermont Valley Railroad; Wabash Railway Company; Wellsville, Coudersport & Pine Creek Railroad Company; West Shore Railroad Company (The New York Central Railroad Company, Lessee); York Harbor & Beach Railroad Company; The Zanesville & Western Railway Company; Benton & Fairfield Railroad Company; Moshassuck Valley Railroad Company; The Bedford Stone Railway Company; Bayfield

Transfer Railway Company; Atlantic & East Coast Terminal Company; Butte, Anaconda & Pacific Railway Company; The Nevada Central Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; The Des Moines Union Railway Company; Escanaba & Lake Superior Railroad Company; Bush Terminal Railroad Company; Genessee & Wyoming Railroad Company; Hoboken Manufacturers Railroad Company; Maryland & Pennsylvania Railroad Company; South Brooklyn Railway Company; American Pneumatic Service Company; Arizona Eastern Railroad Company; Alamogordo & Sacramento Mountain Railway Company; Burrs Ferry, Browndel & Chester Railway Company; Central Pacific Railway Company; Columbia & Palousa Railroad Company; Columbia River & Oregon Central Railroad Company; Columbia Southern Railway Company; Colusa & Hamilton Railroad Company; Dawson Railway Company; Des Chutes Railroad Company; El Paso & Rock Island Railway Company; El Paso & Northeastern Railroad Company; El Paso & Southwestern Company; El Paso & Southwestern Railroad Company; El Paso & Southwestern Railroad Company of Texas; The Galveston, Harrisburg & San Antonio Railway Company; Galveston, Houston & Henderson Railroad Company; Groveton, Lufkin & Northern Railway Company; Ha[illegible]ord & Summit Lake Railway Company; Hearne & Brazos Valley Railroad Company; Houston & Shreveport Railroad Company; The Houston East and West Texas Railway Company; Houston & Texas Central Railroad Company; Idaho Northern Railroad Company; Idaho Southern Railroad Company; Inter-California Railway Company; Lake Creek & Coeur d'Alene Railroad Company; Lake Charles & Northern Railroad Company; Lake Tahoe Railway & Transportation Company; The Leavenworth Depot & Railroad Company; Los Angeles & Pacific Company; Louisiana Western Railroad Company; Malheur Valley Railroad Company; Michigan East & West Railway Company and E. Ford, Receiver; Minneapolis & Rainy River Railway Company; Mojave & Blakersfield Railroad Company; Morenci Southern Railway Company; Morgan's Louisiana & Texas Railroad & Steamship Company; New Mexico Central Railroad Company; New Mexico & Arizona Railroad Company; The Northern Pacific Terminal Company of Oregon; Northwestern Railroad Company; Northwestern Pacific Railroad Company; Ogden Union Railway & Depot Company; Oregon & Washington Railroad Company; Oregon & California Railroad Company; Oregon Railroad & Navigation Company; Oregon Short Line Railroad Company; Oregon-Washington Railroad & Navigation Company; Oregon, Washington & Idaho Railroad Company; Pacific Electric Railway Company; Payette Valley Railroad Company; Peninsular Railway Company (of Cali-
1510 fornia); Phoenix & Eastern Railway Company; Porterville & Northeastern Railway Company; Richmond Belt Railway; Cabine & Northern Railroad Company; The St. Joseph & Grand Island Railway Company; St. Joseph Terminal Railroad Company; Southern Pacific Company; San Diego & Arizona Railway Com-

pany; Southern Pacific Railroad Company; Southern Pacific Terminal Company; South Pacific Coast Railway Company; Spokane Union Depot Company; Texas & New Orleans Railroad Company; Tremont & Gulf Railway Company; Tucson & Nogales Railroad Company; Tucson, Cornelia & Gila Bend Railway Company; Umatilla Central Railway Company; Union Pacific Railroad Company; Visalia Electric Railroad Company; Walla Walla & Columbia River Railroad Company; Willamette Pacific Railway Company; Yakima Valley Transfer Company (Electric); Oahu Railway & Land Company; Cheswick & Harmar Railroad Company; Ferdinand Railroad Company; South Shore Railroad Company; Louisiana & Arkansas Railway Company; Kansas City Northwestern Railroad Company and J. M. Lee, Receiver; San Antonio & Aransas Pass Railway Company; Hannibal Connecting Railroad Company; Northhampton & Bath Railroad Company; The Great Western Railway Company; Southwest Missouri Railway Company; Amsterdam, Chuctanunda & Northern Railroad Company; Alton & Southern Railroad Company; Bauxite & Northern Railway Company; Massena Terminal Railroad Company; Manufacturers Junction Railway Company; Virginia & Truckee Railway; Hawaii Consolidated Railway, Limited; Kahului Railroad Company; Kauai Railway Company; The Kennebec Central Railroad Company; Pittsburgh & Allegheny River Railroad Company; Muncie & Western Railroad Company; Union Traction Company of Indiana; Union Street Railway Company; Albany Southern Railroad Company; Western New York & Pennsylvania Traction Company; The Hill City Railway Company; Fort Worth Belt Railway Company; Union Stock Yards Company of Omaha, Limited; Chicago, Ottawa & Peoria Railway Company; Peoples Traction Company; Cairo & St. Louis Railway Company; St. Louis Electric Bridge Company; St. Louis Electric Terminal Railway Company; Bloomington, Decatur & Champaign Railroad; Danville, Urbana & Champaign Railway Company; Illinois Central Traction Company; St. Louis, Springfield & Peoria Railroad; The Delaware, Lackawanna & Western Railroad Company; Iberia & Vermilion Railroad Company;

The Chesapeake & Ohio Railway Company; The Chesapeake & Ohio Railway Company of Indiana; Chesapeake & Ohio Northern Railway Company; Cincinnati, Interterminal Railroad Company; Covington, Cincinnati, Elevated Railroad & Transfer & Bridge Company; The Hocking Valley Railway Company; Piney River & Paint Creek Railroad Company; Amador Central Railroad Company; Arizona & Swansea Railroad Company; Ashland, Odanah & Marengo Railway Company; Asherton & Gulf Railway Company; Augusta Railroad Company; Bamberger Electric Railroad Company; Black Bayou Railroad Company; Brookings & Peach Orchard Railroad Company; Caddo & Choctaw Railroad Company; Cassville & Exeter Railway Company; Central California Traction Company; Charles City Western Railway Company; Chicago, Harvard &

Geneva Lake Railway Company; Christie & Eastern Railroad Company; Colfax Northern Railway Company; Dardanelle & Russellville Railroad Company; Dayton-Goose Creek Railway Company; The Dayton, Toledo & Chicago Railway Company; Doniphan, Kensett & Searcy Railway; El Dorado & Wesson Railway Company; E. V. Rideout Company; Fairchild & Northeastern Railway; Fordyce & Princeton Railroad Company; Fort Dodge, Des Moines, & Southern Railroad Company; Fort Smith, Sulphur & Rock Island Railroad Company; The Franklin & Abbeville Railway Company; Fresno Valley Railroad Company; Fredericksburg & Northern Railway Company; Fresno Interurban Railway Company; Gales Creek & Wilson River Railroad; Gulf & Northern Railway Company; The Garden City Western Railway Company; Helena, Parkin & Northern Railway Company and H. M. Gregory, Receiver; Hillsboro & Northeastern Railway Company; Interurban Railway Company; Jonesboro, Lake City & Eastern Railroad Company; Kinder & Northwestern Railway Company; The Kansas City Railways Company and F. W. Fleming, Receiver; The Kansas City Railways Company and F. M. Wilson, Receiver; The Kansas & Oklahoma Railway Company; L'Anguille River Railway Company; Leavenworth & Topeka Railroad Company; Little Rock, Maumelle & Western Railroad Company; Louisiana & Northwest Railroad Company and E. R. Bernstein, Receiver; Louisiana & Pacific Railway Company; The Lowville & Beaver River Railroad Company; Masvot & Western Railway Company; Memphis, Dallas & Gulf Railroad Company and M. Walsh, Receiver; Midland Continental Railroad; Minneapolis, Red Lake & Manitoba Railway Company; Milwaukee, Chicago & Michigan City Line; Minnesota Northwestern Electric Railway Company; Manchester & Oneida Railway Company; Mississippi & Western Railroad Company; Merchants Transportation Company; Mississippi Eastern Railway Company; Missouri Southern Railroad Company; Monroe & Texas Railway Company; Montana Western Railway Company; Moscow, Camden & San Augustine Railway Company; Muscatine North & South Railway Company and M. Dailey, Receiver; Muscatine, Burlington & Southern Railroad Company; Oakdale & Gulf Railway Company; Oberlin, Hampton & Eastern Railroad Company; Ouachita & Northwestern Railroad Company; Pacific Coast Railway Company; Pacific Coast Railroad Company; Paragould-Memphis Railroad Company; Phoenix Railway Company of Arizona; The Prescott & Northwestern Railroad Company; Rockingham Railroad Company; Roscoe, Snyder & Pacific Railway Company; Salem, Winona & Southern Railroad Company; The Saline Northern Railroad Company and H. C. Brent, Receiver; The Salina Northern Railroad Company and P. W. Goebel, Receiver; Sand Springs Railway Company; San Antonio Southern Railway Company; Shreveport, Houston & Gulf Railroad Company; The Sibley, Lake Bisteneau & Southern Railway Company; Tabor & Northern Railway Company; Texas City Terminal Company; The Texas Mexican Railway Company; Texas Mid-

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land Railroad; Texas Southeastern Railroad Company; Texas State Railroad; Thornton & Alexandria Railway Company; Trinity Valley & Northern Railway Company; Washington Western Railway Company; Woodworth & Louisiana Central Railway Company; Union Traction Company of Kansas; Kansas, Oklahoma & Gulf Railway Company; Missouri, Oklahoma & Gulf Railway Company of Texas; Louisville & Nashville Railroad Company; The Nashville, Chattanooga & St. Louis Railway; Louisville, Henderson & St. Louis Railway Company; The Kansas City Connecting Railroad Company; Kansas City Stock Yards Company; Oklahoma National Stock Yards Company; St. Louis National Stock Yards; Aberdeen & Rockfish Railroad Company; Alabama Central Railroad Company; Alabama Central Railway; Alabama, Florida & Gulf Railroad Company; Alabama, Tennessee & Northern Railroad Corporation; Alabama & Northwestern Railroad Company; Alcolu Railroad Company; The Akron, Canton & Youngstown Railroad Company; Ashley, Drew & Northern Railway; Appalachian Railway
1512 Company; Arcata & Mad River Railroad Company; Arizona Southern Railroad Company; The Arizona & New Mexico Railway Company; Arkansas & Louisiana Missouri Railway Company; Athens Terminal Company; Atlanta & St. Andrews Bay Railway Company; Atlantic & Carolina Railroad Company; Atlantic Northern Railway Company; Atlantic, Waycross & Northern Railroad Company; Augusta Northern Railway; Bartlett Western Railway Company; Beaver, Meade & Englewood Railroad Company; Bennettsville & Cheraw Railroad Company; Bingham & Garfield Railway Company; Birmingham & Northwestern Railway Company; Birmingham & Southeastern Railway Company and W. M. Blount and John T. Cochrane, Receivers; Boyne City, Gaylord & Alpena Railroad Company; Butler County Railroad Company; Cache Valley Railroad Company; California Central Railroad Company; California Southern Railroad Company; California Western Railroad & Navigtion Company; Cambria & Indiana Railroad Company; Cape Girardeau Northern Railway Company and J. W. Fristoe, Receiver; Campbells Creek Railroad Company; The Carolina & Yadkin River Railway Company; Craig Mountain Lumber Company Railway; Cedar Rapids & Iowa City Railway; Cement, Tolenas & Tidewater Railway; Charlotte Harbor & Northern Railway Company; Chesapeake Western Railroad Company; The Cimarron & Northwestern Railway Company; Cincinnati, Georgetown & Portsmouth Railroad; Cliffside Railroad Company; The Colorado-Kansas Railway Company; Coudersport & Port Allegany Railroad Company; Cowlitz, Chehalis & Cascade Railway; Cumberland & Manchester Railroad Company; Danville & Mount Morris Railroad Company and A. S. Murray, Receiver; De Kalb & Western Railroad Company; Dents Run Railroad Company; Denver & Intermountain Railway Company; DeQueen & Eastern Railroad Company; Durham & Southern Railway Company; East Erie Commercial Railroad; East

Jersey Railroad & Terminal Company; East Tennessee & Western North Carolina Railroad Company; East Texas & Gulf Railway Company; Eastern Kentucky Railway Company; Edgemoor & Marietta Railway Company; Emmitsburg Railroad Company; Etrick & Northern Railroad Company; Elkin & Allegheny Railroad Company; Federal Valley Railroad Company; Felicity & Bethel Railroad; Fellsmere Railroad; Fernwood, Columbia & Gulf Railroad Company; Flint River & Northeastern Railroad Company; Fourche River Valley & Indian Territory Railway Company; Frankfort & Cincinnati Railway Company; Gainesville & Northwestern Railroad Company; Gainesville Midland Railway Company; Garyville Northern Railroad Company; Georgia Northern Railway Company; Gideon & North Island Railroad Company;

Glenmora & Western Railway Company; Grand Rapids Terminal Belt Railway Company; Grasse River Railroad Corporation; Great Southern Railroad Company; Greene County Railroad Company; Gulf, Mobile & Northern Railroad Company; Gulf, Texas & Western Railway Company; Hampton & Branchville Railroad Company; Hardwick & Woodbury Railroad Company; Holton Interurban Railway Company; Iowa Southern Utilities Company; Ironton Railroad Company; Kansas City, Kaw Valley & Western Railway Company; Kansas City, Leavenworth & Western Railway Company; Kellys Creek & Northwestern Railroad Company; Kentwood & Eastern Railway Company; Kentwood, Greensburg & Southwestern Railroad Company; Kosciusko & Southeastern Railroad Company; Knoxville, Sevierville & Eastern Railway Company; Jamestown, Westfield & Northwestern Railroad Company; Jefferson & Northwestern
1513 Railway Company; Joplin & Pittsburg Railway Company; La Crosse & Southeastern Railway Company; Lake Erie, Franklin & Clarion Railroad Company; The Lakeside & Marblehead Railroad Company; Laurel Fork Railway Company; Lawndale Railway & Industrial Company; The Lewiston, Nezperce & Eastern Railroad Company; Ligonier Valley Railroad Company; Linville River Railway Company; Little River Railroad Company of Tennessee; Live Oak, Perry & Gulf Railroad Company; McCloud River Railroad Company; Manitou & Pikes Peak Railroad Company; Marion & Eastern Railroad Company; Maxton, Alma & Southbound Railroad Company; Meridian & Memphis Railway Company; Middletown & Unionville Railroad Company; Minnesota, Dakota & Western Railway Company; Montana, Wyoming & Southern Railroad Company; Moorehead & North Fork Railroad Company; The Motley County Railway Company; Mount Jewett, Kinzua & Riterville Railroad Company; Natchez, Columbia & Mobile Railroad Company; The Nevada Northern Railway Company; Nevada California Oregon Railway; Nevada County Narrow Gauge Railroad Company; Newaukum Valley Railroad Company; New Castle & Ohio River Railway Company; New Jersey, Indiana & Illinois Railroad Company; The New Mexico Midland Railway Company; New Orleans & Lower

Coast Railroad Company; Northeast Oklahoma Railroad Company; New Orleans, Natalbany & Natchez Railway Company; New York Dock Railway; The New Park & Fawn Grove Railroad Company; Nezperce & Idaho Railroad Company; North Louisiana & Gulf Railroad Company; Norwood & St. Lawrence Railroad Company; Ocilla Southern Railroad Company and M. W. Garbutt, Receiver; Ocilla Southern Railroad Company and J. A. J. Henderson, Receiver; Ocklawaha Valley Railroad Company and H. S. Cummings, Receiver; Okmulgee Northern Railway Company; Oneida & Western Railroad Company; Oregon Pacific & Eastern Railway Company; Pacific & Idaho Northern Railway Company; Wyoming Railway Company; Pearl River Valley Railroad Company; Pelham & Havana Railroad Company; The Pickens Railroad Company; Pine Bluff & Northern Railway Company; Pittsburgh & Susquehanna Railroad Company; The Pittsburgh, Lisbon & Western Railroad Company; Puget Sound & Cascade Railway Company; Rahway Valley Company, Lessee; Randolph & Cumberland Railway Company; Ray & Gila Valley Railroad Company; Red River & Gulf Railroad Company; Roanoke Railway Company; Roaring Fork Railroad Company; Rock Island Southern Railway Company and T. H. Beacon, Receiver; Rock Island Southern Railway Company and W. T. Abbott, Receiver; Rome & Northern Railroad Company and D. B. Carson, Receiver; Sacramento Northern Railroad; Salt Lake & Utah Railroad Company; St. Louis & Hannibal Railroad Company; San Benito & Rio Grande Valley Railway Company; San Joaquin & Eastern Railroad Company; San Luis Central Railroad Company; The San Luis Southern Railway Company; Saratoga & Encampment Railroad Company; Shearwood Railway Company; Sierra Railway Company of California; Skaneateles Railroad Company; South Manchester Railroad Company; Stanley, Merrill & Phillips Railway Company; The Sterling Mountain Railway Company; Springfield Electric Railway Company; Sugar Land Railway Company; Talbotton Railroad Company; Tampa & Jacksonville Railway Company; Tennessee & North Carolina Railway Company; Texas, Oklahoma & Eastern Railroad Company; Tooele Valley Railway Company; Townsville Railroad Company; Trinity Valley Southern Railroad Company; The Tuckerton Railroad Company; Union & Glenn Springs Railroad Company; Ursina & North Fork Railway Company;
1514 Valdosta, Moultrie & Western Railway Company and R. P. Murray, Receiver; Virginia & Carolina Southern Railroad Company; The Wabash, Chester & Western Railroad Company; Walla Walla Valley Railroad Company; Warren & Ouachita Valley Railway Company; Waterloo, Cedar Falls & Northern Railway Company; The Weatherford, Mineral Wells & Northwestern Railway Company; Waterville Railway Company; Wautauga & Yadkin River Railroad Company and W. J. Grandin, Receiver; Waycross & Western Railroad Company; West Virginia Northern Railroad

Company; White River Railroad Company; Wildwood & Delaware Bay Short Line Railroad Company; Wichita Falls & Southern Railway Company; The Winfield Railroad Company; Wyandotte Southern Railroad Company; Yosemite Valley Railroad Company; The Youngstown & Ohio River Railroad Company; Yreka Railroad Company; Electric Short Line Railway Company; Leesville, Slagle & Eastern Railway Company; Santa Maria Valley Railroad Company; Natchez, Urania & Ruston Railway Company; The Atchison, Topeka & Santa Fe Railway Company; Baton Rouge; Hammond & Eastern Railroad Company; The Arkansas Western Railway Company; Blue Island Railroad Company; Beaumont Wharf & Terminal Company; Big Fork & International Falls Railway Company; Big Fork & Northern Railway Company; Chicago, Memphis & Gulf Railroad Company; The California, Arizona & Santa Fe Railway Company; Canton, Aberdeen & Nashville Railroad Company; Camas Prairie Railroad Company; Chicago, St. Louis & New Orleans Railroad Company; The Chicago & Alton Railroad Company; Chicago Junction Railway Company; The Chicago River & Indiana Railroad Company; Chicago, South Bend & Northern Indiana Railway Company; Concho, San Saba & Llano Valley Railway Company; Dubuque & Sioux City Railroad Company; Eastern Railway Company of New Mexico; Dunleith & Dubuque Bridge Company; El Paso Union Passenger Depot Company; Gilmore & Pittsburgh Railway Company; The Grand Canyon Railway Company; Gulf & Interstate Railway Company of Texas; Gulf, Colorado & Santa Fe Railway Company; Helm & Northwestern Railroad Company; Houston Belt & Terminal Railway Company; Illinois Central Railroad Company; The Joliet & Chicago Railroad Company; Joplin Union Depot Company; The Kansas City Southern Railway Company; Los Angeles & Salt Lake Railroad Company; Kansas City, Shreveport & Gulf Terminal Company; Kansas City Terminal Railway Company; Louisiana & Missouri River Railroad Company; Mason City & Clear Lake Railroad Company; The Maywood & Sugar Creek Railway Company; Minnesota & International Railway Company; Missouri, Kansas & Texas Railway Company and C. E. Schaff, Receiver; The Missouri, Kansas & Texas Railway Company of Texas and C. E. Schaff, Receiver; New Jersey & Staten Island Ferry Company; Northern Pacific Railway Company; North Yakima & Valley Railway Company; The Ohio Electric Railway Company and B. J. Jones, Receiver; Oil Fields & Santa Fe Railway Company; Omaha Bridge & Terminal Railway Company; Pacific Northwest Traction Company; Panhandle & Santa Fe Railway Company; The Pecos & Northern Texas Railway Company; Pecos River Railroad Company; Phillipsburgh Transit Company; Port Townsend Southern Railroad Company; The Potean Valley Railroad Company; Rio Grande, El Paso & Santa Fe Railroad Company; Rio Grande & El Paso Railroad Company; Rocky Mountain & Santa Fe Railway Company; Scottdale Connecting Railroad

Company; The South Chicago Railroad Company; South Plains & Santa Fe Railway Company; The Sunflower & Eastern Railway Company; Southern Kansas Railway Company of Texas;
1515 Southern Michigan Railway Company; Sunset Railway Company; St. Louis, Belleville & Southern Railway Company; Texas & Gulf Railway Company; Texarkana & Fort Smith Railway Company; Union Depot Company of Kansas City, Missouri; The Yazoo & Mississippi Valley Railroad Company; The Wichita Falls & Northwestern Railroad Company and C. E. Schaff, Receiver; Chicago, West Pullman & Southern Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; Deering Southwestern Railway; Illinois Northern Railway Company; The Owasco River Railway; Sidell & Olney Railroad Company;

The Springfield Terminal Railway Company; Wisconsin & Northern Railway Company; Sumter & Choctaw Railway Company; The Uintah Railway Company; Brownstone & Middletown Railroad Company; The Buffalo Creek & Gauley Railroad Company; Fore River Railroad Corporation; Patapsco & Black River Railroad Company; Philadelphia, Bethlehem & New England Railroad Company; Steelton & Highspire Railroad Company; Chestnut Ridge Railway Company; Bullfrog Goldfield Railroad Company; Death Valley Railroad Company; Depue & Northern Railroad Company; Mineral Point & Northern Railway Company; San Francisco & Oakland Terminal Railway Company; Tonopah & Tidewater Railroad Company; Akron Union Passenger Depot Company; Baltimore & New York Railroad Company; Baltimore & Ohio & Chicago Railroad Company (Illinois); Baltimore & Ohio & Chicago Railroad Company (Ohio & Indiana); Baltimore & Ohio Chicago Terminal Railroad Company; The Baltimore & Ohio Connecting Railroad Company; the Baltimore & Ohio Railroad Company; The Baltimore & Ohio Railroad Company in Pennsylvania; The Baltimore & Ohio Southwestern Railroad Company; The Baltimore & Philadelphia Railroad Company; The Baltimore Belt Railroad Company; Belington & Northern Railroad Company; Capitol Traction Company; Coal & Coke Railway Company; The Confluence & Oakland Railroad Company; The Dayton & Union Railroad Company; Elwood Short Line Railroad Company; Fairmont, Morgantown & Pittsburgh Railroad Company; Hamilton Belt Railway Company; Hampshire Southern Railway Company; The Hardmans Branch Railroad Company; Indian Creek Valley Railway Company; Lehigh & New England Railroad Company; The Lancaster, Cecil & Southern Railroad Company; Little Kanawha Railroad Company; the Metropolitan Southern Railroad Company; Millers Creek Railroad Company; Morgantown & Kingwood Railroad Company; Ohio & Little Kanawha Railroad Company; Pittsburgh Junction Railroad Company; Pittsburgh Western Railroad Company; The Quemahoning Branch Railroad Company; The Sandy Valley & Elkhorn Railway Company; Sandyville & Waynesburg Railroad Company; The

Schuylkill River & East Side Railroad Company; The Sharpsville Railroad Company and G. K. McIlvain, Receiver; Smithfield & Masontown Railroad Company; The Staten Island Railway Company; The Staten Island Rapid Transit Railway Company; The Tylersdale Connecting Railroad Company; The Valley Railroad Company of Virginia; Washington & Western Maryland Railroad Company; Washington County Railroad Company; Washington Run Railroad Company; The Washington Terminal Company; The Wheeling, Pittsburgh & Baltimore Railroad Company; The Winchester & Potomac Railroad Company; The Winchester & Strausburg Railroad Company; The Albana Railroad Bridge Company; Belle Fourche Valley Railway Company; Birmingham Belt Railroad Company; Chicago & North Western Railway Company; Chicago, Rock Island & El Paso Railway Com-
1516 pany; The Chicago, Rock Island & Pacific Railway Company; The Chicago, Rock Island & Gulf Railway Company; Brownwood North & South Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Choctaw, Oakland & Gulf Railroad Company; Depue, Ladd & Eastern Railway Company; Des Plaines Valley Railway Company; Fort Worth & Rio Grande Railway Company; James River Valley & Northwestern Railway Company; The Kansas City, Clinton & Springfield Railway Company; The Kansas City, Fort Scott & Memphis Railway Company; Keokuk & Des Moines Railway Company; Kansas City, Memphis & Birmingam Railroad Company; Macoupin County Railway Company; Manitowoc, Green Bay & Northwestern Railway Company; Milwaukee State Line Railway Company; Milwaukee, Sparta & Northwestern Railway Company; Minneapolis Eastern Railway Company; Missouri Valley & Blair Railway & Bridge Company; Paris & Great Northern Railroad Company; Peoria & Bureau Valley Railroad Company; Peoria Railway Terminal Company; Princeton & Western Railway Company; Quanah, Acme & Pacific Railway Company; Rock Island & Dardenelle Railway Company; Rock Island, Arkansas & Louisiana Railroad Company; Rock Island, Stuttgart & Southern Railway Company; St. Louis-San Francisco Railway Company; St. Louis, Kansas City & Colorado Railroad Company; The St. Louis, Peoria & Northwestern Railway Company; St. Paul & Kansas City Short Line Railroad Company; St. Louis, San Francisco & Texas Railway Company; St. Paul & Sioux City Railroad Company; St. Paul Eastern Grand Trunk Railway Company; Sioux City Bridge Company; Sligo & Eastern Railroad Company; Washington, Baltimore & Annapolis Electric Railroad Company; Winona & St. Peter Railroad; Wolf River Valley Railway Company; Wyoming & Northwestern Railway Company; The Interstate Railroad Company; Cairo & Kanawha Railway Company; Abilene & Southern Railway Company; Adirondack & St. Lawrence Railroad Company; The Alabama Northern Railway Company; Allegheny & South Side Railway Company; Aransas Harbor Terminal Railway Company; Atlanta, Birmingham & Atlantic Railway Company; Buffalo, Roch-

ester & Pittsburgh Railway Company; Carrollton & Worthville Railroad Company; Central Valley Railroad Company; Chattahoochee Valley Railway Company; Chicago, Indianapolis & Louisville Railway Company; The City Electric Railway Company; The Colorado & Wyoming Railway Company; The Crystal River Railroad Company; Detroit & Lake St. Clair Railway; Detroit, Almont & Northern Railroad; Detroit, Jackson & Chicago Railway; Detroit, Monroe & Toledo Short Line Railway; Detroit, Mount Clemens & Marine City Railway; Detroit United Railway; Evansville & Southern Indiana Traction Company; The Grand Rapids, Grand Haven & Muskegon Railway Company; Hoosac Tunnel & Wilmington Railroad Company; Indianapolis & Cincinnati Traction Company; Flemingsburg & Northern Railroad Company; Indianapolis, Columbus & Southern Traction Company; Kentucky Midland Railroad Company; Lackawanna & Wyoming Valley Railroad Company; Laurel Railway Company; Manistee & Repton Railroad; The Midland Terminal Railway Company; Pascagoula Street Railway & Power Company; The Port Huron & St. Clair & Marine City Railway Company; Public Utilities Company; Rapid Railroad Company; the Rapid Railway Company; Rapid Railway System; Rural Valley Railroad; Scranton & Northeastern Railroad Company; Toledo & Indiana Traction Company; Wilkes-Barre Railroad Company; Winona Interurban Railway Company and C. J. Munton, Receiver; Zwolle & Eastern Railway Company; American
1517 Electric Railway Association; The Brimstone Railroad & Canal Company; New York, Ontario & Western Railway Company; The Rhode Island Company and Z. W. Bliss, Receiver; The Rhode Island Company and T. H. Green, Receiver; The Rhode Island Company and F. H. Swan, Receiver; Woodstock Railway Company; The Canadian Pacific Railway Company; Delray Connecting Railroad Company; The Dominion Atlantic Railway Company; The Duluth, South Shore & Atlantic Railway Company; Garden Bay Railway Company; Esquimalt & Nanaimo Railway Company; Houlton Branch Railroad Company; Mineral Range Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Newport & Richford Railroad Company; Spokane International Railway Company; Tonopah & Goldfield Railroad Company; Bangor & Aroostook Railroad Company; Big Sandy & Cumberland Railroad Company; Blytheville, Leachville & Arkansas Southern Railroad Company; The Colorado & Southeastern Railroad Company; The Cuyahoga Valley Railway Company; Galesburg & Great Eastern Railroad Company; Galveston Wharf Company; Intermountain Railway Company; LaSalle & Bureau County Railroad Company, Marion & Rye Valley Railway Company; The Michigan & Chicago Railway Company; Michigan Railroad Company; Michigan United Railways Company; Mississippi River & Bonne Terre Railway; Mount Hope Mineral Railroad Company; Niagara Junction Railway Company; Northwestern Coal Railway Company; Smoky Mountain

Railway Company; Sugar Pine Railway Company; Utah Railway Company; Virginia Southern Railroad Company; Wellington & Powellsville Railroad Company; American Railroad Company of Porto Rico; The Pittsburgh & West Virginia Railway Company; West Side Belt Railroad Company; Chicago Short Line Railway Company; The Kanawha Central Railway Company; The Paterson & Hudson River Railroad Company; The Paterson & Ramapo Railroad Company; Union Railroad Company; Arlington Railroad Company; Arnot & Pine Creek Railroad Company; Bath & Hammondsport Railroad Company; Bergen & Dundee Railroad Company; Bergen County Railroad Company; Central Vermont Railway Company; Champlain & St. Lawrence Railroad Company; Chicago & Erie Railroad Company; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company; Conesus Lake Railroad Company; The Detroit & Huron Railway Company; Detroit, Grand Haven & Milwaukee Railway Company; Docks Connecting Railway Company; Elmira State Line Railroad Company; The Erie & Black Rock Railroad Company; Erie & Wyoming Valley Railroad Company; Erie Railroad Company; Erie Terminal Railroad Company; Eriton Railroad Company; The Grand Trunk Milwaukee Car Ferry Company; Grand Trunk Railway Company of Canada; Grand Trunk Western Railway Company; Hackensack & Lodi Railroad Company; International Bridge Company; Jefferson Railroad Company; Lodi Branch Railroad Company; Long Dock Railroad Company; Macopin Railroad Company; Michigan Air Line Railway; Middletown & Crawford Railroad Company; New Jersey & New York Extension Railroad Company; New Jersey & New York Railroad Company; New York & Greenwood Lake Railway Company; New York Lake Erie & Western Coal & Railroad Company; New York, Susquehanna & Western Railroad Company; Northern Railroad Company of New Jersey; Nypano Railroad Company; The Paterson, Newark & New York Railroad Company; Passaic & New York Railroad Company; Pontiac, Oxford & Northern Railroad Company; Rochester & Genesee Valley Railroad Company; The St. Clair Tunnel Company; Susquehanna Connecting Rail-
1518 road Company; Tioga Railroad Company; Toledo, Saginaw & Muskegon Railway Company; United States & Canada Railroad Company; Wilkes-Barre & Eastern Railroad Company; Butte Electric Railway Company; St. John & Ophir Railroad Company; Verde Tunnel & Smelter Railroad Company; Altoona Northern Railroad Company; Virginia Blue Ridge Railway Company; Abilene & Northern Railway Company; Central New England Railway Company; Chicago, Burlington & Quincy Railroad Company; The Colorado & Southern Railway Company; The Colorado Springs & Cripple Creek District Railway Company; Davenport, Rock Island & Northwestern Railway Company; The Denver Union Terminal Railway Company; Duluth & Superior Bridge Company; Duluth Terminal Railway Company; Farmers Grain & Shipping Company; The Fort Worth & Denver City Railway Company; The

Great Northern Railway Company; Inland Empire Railroad Company; Lake Superior Terminal & Transfer Company; Minneapolis Western Railway Company; New York & Stamford Railway Company; The New York, New Haven & Hartford Railroad Company; New York, Westchester & Boston Railway Company; Oregon Electric Railway Company; Quincy, Omaha & Kansas City Railroad Company; Spokane & Eastern Railway & Power Company; Spokane, Portland & Seattle Railway Company; Stamford & Northwestern Railway Company; The Trinity & Brazos Valley Railway Company and J. A. Hulen, Receivers; United Railway Company; Watertown & Sioux Falls Railway Company; Wichita Falls & Oklahoma Railway Company; Wichita Valley Railroad Company; The Wichita Valley Railway Company; Winona Bridge Railway Company; The Colorado, Wyoming & Eastern Railway Company; New Orleans Great Northern Railroad Company; Mississippi Central Railroad Company; Gulf & Ship Island Railroad Company; The Maryland Electric Railways Company; The Akron & Barberton Belt Railroad Company; The Atchison & Eastern Bridge Company; Baltimore, Chesapeake & Atlantic Railway Company; Calumet Western Railway Company; Cherry Tree & Dixonville Railroad Company; Chicago, Indiana & Eastern Railway Company; Cincinnati, Richmond & Fort Wayne Railroad Company; The Cincinnati, Lebanon & Northern Railway Company; The Cleveland & Pittsburgh Railroad Company; The Connecting Terminal Railroad Company; The Cumberland Valley Railroad Company; Dayton, Lebanon & Cincinnati Railroad & Terminal Company; Englewood Connecting Railway Company; Erie & Pittsburgh Railroad Company; Grand Rapids & Indiana Railway Company; The Indianapolis Union Railway Company; The Little Miami Railroad Company; The Long Island Railroad Company; The Lorrain, Ashland & Southern Railroad Company; Manufacturers Railway Company; Maryland, Delaware & Virginia Railway Company; Massillon & Cleveland Railroad Company; The Monongahela Railway Company; New York, Philadelphia & Norfolk Railroad Company; Norfolk & Portsmouth Belt Line Railroad Company; The Ohio Connecting Railway Company; The Ohio River & Western Railway Company; Pennsylvania Company; The Pennsylvania Railroad Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; Pittsburgh, Fort Wayne & Chicago Railway Company; The Pittsburgh, Ohio Valley & Cincinnati Railroad Company; Pittsburgh, Wheeling & Kentucky Railroad Company; The Pittsburgh, Youngstown & Ashtabula Railway Company; Rosslyn Connecting Railroad Company; South Chicago & Southern Railroad Company; Terre Haute & Peoria Railroad Company; Toledo, Columbus & Ohio River Railroad Com-
1519 pany; Toledo, Peoria & Western Railway Company and E. N. Armstrong, Receiver; Union Railroad Company of Baltimore; Waynesburg & Washington Railroad Company; Western New York

& Pennsylvania Railway Company (New Castle Branch); West Jersey & Seashore Railroad Company; Wheeling Terminal Railway Company; Youngstown & Ravenna Railroad Company; Chesapeake Beach Railway Company; The Huntingdon & Broad Top Mountain Railroad & Coal Company; Lykens Valley Railroad & Coal Company; Bay Terminal Railroad Company; Beaver Valley Railroad Company; Delaware River & Union Railroad Company; Alexandria & Western Railway Company; Cornwall Railroad Company; Franklin & Pittsylvania Railroad Company; Gulf, Florida & Alabama Railroad Company and J. T. Steele, Receiver; Lufkin, Hemphill & Gulf Railroad Company; Montour Railroad Company; Pecos Valley Southern Railway Company; Peoria & Pekin Union Railway Company; Potato Creek Railroad Company; St. Louis, El Reno & Western Railway Company and A. L. Mills, Receiver; The Savannah & Southern Railway Company; Silverton Northern Railroad Company; Tuscarora Valley Railroad Company; Silverton Railway Company; Statenville Railway Company; Ahnapee & Western Railway Company; Arcadia & Betsey River Railway Company; Bellefonte Central Railroad Company; Bevier & Southern Railroad Company; Bloomsburg & Sullivan Railroad Company; Central West Virginia & Southern Railroad Company; Clarendon & Pittsford Railroad Company; Copper Range Railroad Company; Delaware & Northern Railroad Company; Duluth & Northwestern Railroad Company; Georgia Southwestern & Gulf Railroad Company; Grafton & Upton Railroad Company; Green Bay & Western Railroad Company; Illinois Terminal Railroad Company; Kishocoquillas Valley Railroad Company; Kewaunee, Green Bay & Western Railroad Company; Lake Champlain & Moriah Railroad Company; Madison Southern Railway Company; Nelson & Albemarle Railway Company; Ontonagon Railroad Company; The Pittsburg, Shawmut & Northern Railroad Company and H. S. Hastings, Receiver; Tana & Toledo Railroad Company; Texas Short Line Railway Company; Unadilla Valley Railway Company; Union Transportation Company; Valley Railroad Company of Weste Line, Pa.; Waupaca Green Bay Railroad Company; Williamsport & North Branch Railway Company and E. Bailey, Receiver; Bay Point & Clayton Railroad Company; Clarion River Railway Company; Dry Fork Railroad Company; Kersey Railroad Company; Nearne, Carson & Southern Railroad Company; Ohio & Kentucky Railway Company; Stewartstown Railroad Company; Enterprise Railway Company; Escambia Railway; Hickory Valley Railroad Company; Hiwanee & Tombigbee Railroad Company; Kingston Railroad Company; Louisiana & Pine Bluff Railway Company; Malvern & Fresco Valley Railway Company; Mansfield Railway & Transportation Company; The Nacogdoches & Southeastern Railroad Company; Shubuta & Southwestern Railroad Company; Tifton Terminal Company; Tyrone & St. Francis River Railway Company; Wisconsin & Northwestern Railway;

Atlantic City Railroad Company; Catasauqua & Fogelsville Railroad Company; The Central Railroad Company of New Jersey; Chester & Delaware River Railroad Company; The Dover & Rockaway Railroad Company; The Gettysburg & Harrisburg Railway Company; Middletown & Hummelstown Railroad Company; The New York & Long Branch Railroad Company; The Northeast Pennsylvania Railroad Company; The Ogden Mine Railroad Company; Perkiomen Railroad Company; The Philadelphia & Chester Valley Railroad Company; Philadelphia & Reading Railway Company; Philadelphia
1520 Belt Line Railroad Company; The Philadelphia, Newtown & New York Railroad Company; Pickering Valley Railroad Company; The Port Reading Railroad Company; Raritan River Railroad Company; Reading & Columbia Railroad Company; The Rupert & Bloomsburg Railroad Company; Stony Creek Railroad Company; The Tamaqua, Hazelton & Northern Railroad Company; The Williams Valley Railroad Company; Intercolonial Railway of Canada; Midland Valley Railroad Company; Canadian Northern Railway Company; New London Northern Railroad Company; Duluth, Winnipeg & Pacific Railway Company; Halifax Southwestern Railway Company; Sault Ste. Marie Bridge Company; West River Railroad Company; Alaska Northern Railway Company; Tanana Valley Railroad Company; The Due West Railway Company; Washington Virginia Railway Company; Indiana Northern Railway Company; Aliquippa & Southern Railroad Company; The Monongahela Connecting Railroad Company; Kentucky & Tennessee Railway; Lancaster & Chester Railway Company; Alabama & Mississippi Railroad Company; Ware Shoals Railroad; Georgia & Florida Railway and J. F. Lewis, Receiver; Georgia & Florida Railway and L. M. Williams, Receiver; Georgia & Florida Railway and W. R. Sullivan, Receiver; Tennessee Railroad Company and J. N. Baker and H. G. Fowler, Receivers; Massachusetts Northeastern Street Railway Company; Bonlee & Western Railway Company; Atlantic & Western Railroad Company; Copper River & Northwestern Railway Company; Magma Arizona Railroad Company; New York & Pennsylvania Railway Company; Bangor Railway & Electric Company; Cumberland County Power & Light Company; Chicago Great Western Railroad Company; Cooperstown & Charlotte Valley Railroad Company; The Delaware & Hudson Company; Greenwich & Johnsonville Railway Company; Hudson Valley Railway Company; The Leavenworth Terminal Railway and Bridge Company; The Lorain & West Virginia Railway Company; Naperville Junction Railway Company; The Quebec, Montreal & Southern Railroad Company; The Wheeling & Lake Erie Railway Company; Terre Haute, Indianapolis & Eastern Traction Company; Portland Railway, Light & Power Company; Ohio Valley Electric Railway Company; Alabama Great Southern Railroad Company; Asheville & Craggy Mountain Railway Company; Asheville Southern Railway Company; Atlantic & Yadkin Railway Company; Atlanta Terminal Company; Belt

Railway Company of Chattanooga; Birmingham Terminal Company; Blue Ridge Railway Company; Carolina & Northwestern Railway Company; Carolina & Tennessee Southern Railway Company; Chattanooga Station Company; Cincinnati, Burnside & Cumberland River Railway Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; Columbia Union Station Company; Columbus & Greenville Railroad Company; The Cumberland Railroad Company and J. F. Campbell, Receiver; Danville & Western Railway Company; Delta Southern Railway Company; Durham Union Station Company; Elberton Southern Railway Company; Ensley Southern Railway Company; Georgia Midland Railway Company; Georgia Southern & Florida Railway Company; Gulf Terminal Company; Harriman & Northeastern Railroad Company; Hartwell Railway Company; Hawkinsville & Florida Southern Railway Company and R. B. Pegram, Receiver; High Point, Randleman, Asheboro & Southern Railroad Company; Kentucky & Indiana Terminal Railroad Company; Macon & Birmingham Railway Company; Meridian Terminal Company; Mobile & Birmingham Railroad Company; Mobile & Ohio Railroad Company; Mobile Docks Company;
1521 New Orleans & Northeastern Railroad Company; The New Orleans Terminal Company; North Carolina Midland Railroad Company; North Charleston Terminal Company; North & South Carolina Railroad Company; Northern Alabama Railway Company; Richmond & Mecklenburg Railroad Company; St. Johns River Terminal Company; Sievern & Knoxville Railroad Company; Southern Railway Company; Southern Railway (Carolina Division); Southern Railway Company of Indiana; Southern Railway Company, in Kentucky; State University Railroad Company; Tallulah Falls Railway Company; Tennessee & Carolina Southern Railway Company; Woodstock & Blocton Railway Company; Yadkin Railroad Company; Alabama & Vicksburg Railway Company; Norfolk & Western Railway Company; Tennessee Central Railroad Company and W. K. McAlister, Receiver; Tennessee Central Railroad Company and H. W. Stanley, Receiver; Tug River & Kentucky Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Williamson & Pond Creek Railroad Company; Atlanta & West Point Railroad Company; Atlantic Coast Line Railroad Company; Augusta Belt Railway Company; Augusta Union Station Company; Augusta & Summerville Railroad Company; Belt Line Railway of Alabama; Carolina Railroad Company; Carolina, Clinchfield & Ohio Railway; Carolina, Clinchfield & Ohio Railway of South Carolina; Central of Georgia Railway Company; Central Railroad Company of South Carolina; Charleston Terminal Company; Charleston Union Station Company; Charleston & Western Carolina Railway Company; Charlotte, Monroe & Columbia Railroad Company; Chesterfield & Lancaster Railroad Company; Columbia, Newberry & Laurens Railroad Company; East Carolina Railway; East & West Coast Railway; Elberton & Eastern Railroad Company; Florida Central & Gulf Railway; Florida East Coast Railway Company;

Florida East Coast Car Ferry Company; Georgia Railroad; Georgia, Florida & Alabama Railway Company; Goldsboro Union Station Company; Jacksonville Terminal Company; The Kinston Carolina Railroad Company; Lexington Terminal Railroad Company; Louisville & Wadley Railroad Company; Macon, Dublin & Savannah Railroad Company; Marion & Southern Railroad Company; Milledgeville Railway Company; The Monroe Railroad Company; Norfolk Southern Railroad Company; Northwestern Railroad Company of South Carolina; Raleigh & Charleston Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; Savannah River Terminal Company; Savannah Union Station Company; Seaboard Air Line Railway Company; South Carolina Pacific Railroad Company; Sylvania Central Railroad Company; Tampa & Gulf Coast Railroad Company; Union Point & White Plains Railroad Company; The Virginian Railway Company; Wadley Southern Railway Company; Washington & Lincolnton Railroad Company; Washington & Vandemere Railroad Company; Western Railway of Alabama; Wilmington Railway Bridge Company; Winston-Salem Southbound Railway Company; Wrightsville & Tennille Railroad Company; Detroit & Toledo Shore Line Railroad Company; Toledo, St. Louis & Western Railroad Company and W. L. Ross, Receiver; The Ulster & Delaware Railroad Company; Transylvania Railroad Company; Washington & Old Dominion Railway; Panama Railroad Company; Dover & Southbound Railroad Company; Preston Railroad Company; Salt Lake, Garfield & Western Railway Company; The Pullman Company; Pullman Railroad Company; Cumberland & Pennsylvania Railroad Company; Aberdeen & Ashboro Railway Company; Acme Tap Railway Company; Adena Railroad Company; Addison Railroad Company; Addyston & Ohio River
1522 Railroad Company; Agatite Short Line Railway; A. H. Bull Steamship Company; Alabama & Tombigbee Railroad; Alabama City, Gadsden & Attala Railway Company; Alabama Consolidated Coal & Iron Company's Railroad; Alabama Navigation Company; Alabama Northwestern Railway Company; Alabama Southern Railroad Company; Alabama Eastern Railroad Company; Albany & Susquehanna Railroad Company; Albany & Vermont Railroad Company; Albany Day Line; Albany Street Railroad Company; Albertson Great Eastern Railroad Company; Albuquerque Eastern Railway Company; Alexander & Eastern Railway Company; Algiers Railway & Lighting Company; Allegheny & Western Connecting Railway Company; Allegheny & Western Railway Company; Allegheny Railroad Company; Allegheny Terminal Company; Allentown Railroad Company; Allentown Terminal Railroad Company; Alton Terminal Railway Company; Altoona, Juniata & Northern Railway Company; Altoona & Beech Creek Railroad Company; Amador Railway Company; Ames & College Railway Company (Electrical); Anderson & Bella Vista Railroad; Anderson & Salina River Railroad Company; Annapolis & Chesapeake Railroad Company; The Anning J. Smith Trans-

portation Line and J. C. J. Van Noyes, Receiver; Apalachia & Cleveland Railway; Arbacoochee Timber & Railway Company; Argentine & Grays Peak Railway; Argentine Central Railway; Arkansas & Gulf Railroad Company; Arkansas & Eastern Railroad Company; Arkansas, Oklahoma & Western Railroad; Arkansas, Red River & Paris Railway Company; Arkansas Valley Railroad Company; Aroostook River Railroad; Andalusia, Florida & Gulf Railway; Androscoggin & Kennebec Railway Company; Atlantic City & Shore Railway Company and A. J. Puritan, Receiver; Asheville Northern Railroad Company; Athens, Amesville & Chauncey Railway Company; Athens Belt Line Railroad Company; Atchison Union & Depot Railroad Company; Atlanta Belt Line Company; Atlanta & Charlotte Air Line Railway Company; Atlantic & Carolina Railroad; Atlantic & St. Lawrence Railroad Company; Atlantic Coast Lumber Corporation's Railroad; Atlantic Northern & Southern Railway Company; Atlantic Southern Railroad Company; Atlantic, Quebec & Western Railway Company; Atlantic Shore Railway and F. O. Conant & Constant Southworth, Receivers; Attleboro Branch Railroad Company; Austin Dam & Suburban Railroad Company; Augusta & Northwestern Railway Company; Augusta & Savannah Railroad Company; Augusta & Savannah Steamboat Company and W. A. Smith, Receiver; Augusta-Savannah Navigation Company; Aurora, DeKalb & Rockford Electric Traction Company; Aurora, Elgin & Chicago Railroad Company and J. K. Choate, Receiver; Avon, Geneseo & Mount Morris Railroad Company; Ayer & Lord Barge Company; Bachman Valley Railroad Company; Bakersfield & Ventura Railroad Company; Baldwin County Transportation Company; Ballard & Thompson Railroad; Bare Rock Railroad Company; Barnegat Railroad Company; Barre & Chelsea Railroad; Barre Branch Railroad Company; Barre Railroad Company; Bastrop & Lake Providence Railway; Battle Creek & Sturgis Railway Company; Bay City & Battle Creek Railway Company; Bay de Noquet Railroad Company; Bayfield Harbor & Great Western Railroad Company; Bayfield, Superior & Minneapolis Railway Company; Bayonne & New Haven Transportation Company; Bay Shore Connecting Railroad Company; Bay Shore Railway; Bayside Logging Railroad; Bay State Railroad; Beach & Mill Line; Beaverton & Willsburg Railroad Company; Bearden & Ouachita River Railroad Company; Beaufort County Lumber Company's Railroad; Beaver Connecting Railroad Company; Beaver Creek Railroad Company; Beaver
1923 Meadow, Treskow & New Boston Railroad; Beaver & Ellwood Railroad Company; Bedford & Hollidaysburg Railroad Company; Bedford & Bridgeport Railway Company; Beech Creek Extension Railroad Company; Bedford & Wallner Railroad Company; Bee Tree Railroad Company; Beirne & Clear Lake Railroad Company; Belcher Mountain Railway Company; Bellevue Valley Railroad Company; Belt Railroad & Stock Yard Company; Belt

Railroad of San Francisco; Belvidere Delaware Railroad Company; Bennett & Eastern Railroad; Benton Harbor Terminal Railway Company; Bering, Kiam & Southern Railroad Company; Berkeley Springs & Potomac Railroad Company; Berkshire Railroad Company; Berlin Railroad Company; Bernice & Northwestern Railway Company; Bessemer & Southwestern Railroad; Bethel Granite Railway Company; Birmingham & Atlantic Railroad Company and G. R. Williams, Receiver; Big Creek & Trinity Valley Railway Company; Big Creek Lumber Company's Railroad; Big Falls Railway Company; Big Stone Gap & Powells Valley Railroad Company; Billings & Central Montana Railway; Birmingham & Gulf Railway & Navigation Company; Bluestone Traction Company; Black & White River Transportation Company; Black Lick & Yellow Creek Railroad Company; Black Mountain Railway; Bladen & Columbus Railroad Company; Blakeley Southern Railroad Company and J. B. Bevings, Receiver; Blaney & Southern Railroad Company; Bloomington Southern Railroad Company; Bluefields Fruit & Steamship Company; Blue Funnel Line; Blue Hill Line; Blue Ridge & Atlantic Railway Company; Bluffton, Geneva & Salina Traction Company; Bogue Chitto, Liberty & Southwestern Railroad; Boise City Railway & Terminal Company; Bamberg, Ehrhardt & Walterboro Railway Company; Bonita & Fort Myers Connecting Line; Book Cliff Railroad Company; Border Line Transportation Company; Boston & Gloucester Steamship Company; Boston & Little River Railway Company; Boston & Lowell Railroad Corporation; Boston & Norfolk Line; Boston & Portland Line; Boston & Providence Railroad Corporation; Boston & Yarmouth Steamship Company; Boston, Norfolk, Newport News & Baltimore Line; Boston, Revere Beach & Lynn Railroad Company; Boston Terminal Company; Bowden Railway; Bowie, Lafourche & Northwestern Railway Company; Bowling Green Railroad Company; Bradford Railway Company; Branchville & Bowman Railroad Company; Brandon & West Rutland Railroad Company; Brandon, Devils Lake & Southern Railway Company; Branden, Saskatchewan & Hudson Bay Railway Company; Brice & Smart Railroad; Bridgeport & Windmire Railway Company; Bridgeport Line; Bristol Railroad Company and R. Denio, Receiver; British Columbia Electric Railway, Limited; British Yukon Navigation Company; British Yukon Railway; Brockton & Plymouth Street Railway Company; Brook Railroad Company; Brookfield Railroad Company; Brookings Lumber & Box Company's Railroad; Brooklyn Eastern District Terminal; Brooksville Railroad; Brunswick & Chillicothe Railroad Company; Brunswick & Florida Steamship Company; Brunswick Steamboat Lines; Blue Island Railway Company; Brunswick & Florida Steamboat Company; Buchanan Lumber Company's Railroad; Buchanan & St. Joseph River Railroad; Bucksport & Elk River Rail-

road Company; Berkshire Street Railway Company; Buffalo & Susquehanna Coal & Coke Company's Railroad; Buffalo, Bradford & Pittsburgh Railroad Company; Buffalo Creek Transfer Railroad Company; Buffalo Erie Basin Railroad Company; Buffalo, Thousand Island & Portland Railroad Company; Burlington & Southeastern Railroad Company; Burton Lumber Company's Railroad; Burton Steamship Company; Bush Line; Butte
1524 County Railroad Company; Butters Lumber Company's Railroad; Canadian National Railways; California Northeastern Railway Company; Canada Interlake Line, Limited; Canadian Lake Line; Cadiz Railroad in Kentucky; Cairo, Memphis & Southern Railroad & Transportation Company; Cairo Railroad; Caldwell & Northern Railroad Company; Caldwell Interurban Railway Company; Caldwell Norton Lumber Company's Railroad; California Navigation & Improvement Company; California Northwestern Railway; California Southern Railroad Company; Calcosahatchie River Steamboat Line; Calumet Fuel Company's Railroad; Calumet & Southeastern Railway Company; Cambria & Clearfield Railway Company; Camden & Burlington County Railroad Company; Camino, Placersville & Lake Placid Railway; Campbell Hall Connecting Railway Company; Campbell Lumber Company's Railroad; Canada & Gulf Terminal Railroad; Canada, Atlantic & Plant Steamship Company; Canada Southern Bridge Company; Canadian Australian Royal Mail Steamship Line; Canadian Pacific Ocean Service, Limited; Cannelton Railroad Company; Canton & Wooster Railroad Company; Canon City & Cripple Creek Railroad Company; Cape Breton Railway; Caraquet Railway; Carribean & Southern Steamship Company; Carman & Jefferson Railroad; Carolina Valley Railway Company; Carter-Kelley Lumber Company's Logging Railroad; Carthage & Adirondack Railway Company; Carthage & Copenhagen Railroad Company; Carthage Watertown & Sacket's Harbor Railroad Company; Casco Bay & Harpswell Lines; Cashie & Chowan Railroad & Lumber Company; Casper, South Fork & Eastern Railroad; Castle Valley Railroad Company; Catahoula Central Railway Company; Catawissa Railroad Company; Catonsville Shore Line Railroad Company; Catskill Mountain Railroad Corporation; Casenovia Southern Railroad Company; Catskill Evening Line; Cayahuga & Susquehanna Railroad Company; Central Electric Traffic Association; Central California Railway Company; Central Arkansas & Eastern Railroad Company; Central American Railroads; Central Arizona Railway Company; Central Dock & Terminal Railway Company; Central Ontario Railway Company; Central Pennsylvania Lumber Company's Railroad; Central Railroad Company of Louisiana; Central Railroad Company of Oregon; Central Railroad Company of Pennsylvania; Central Transfer Railway & Storage Company; Central Trunk Railroad Company; Chicago, Aurora & DeKalb Railroad Company and H. Gunsel, Receiver; Chico & Northern Railroad Company; Chagrin Falls & Lake Erie

Railroad Company; Champion Lumber Company's Railroad; Changninola Railway; Charlottesville & Rapidam Railroad Company; Chateaugay & Lake Placid Railway Company; Chatham Railroad Company; Chattahoochee & Gulf Railroad Company; Chattanooga Packet Company (Tennessee); Chattanooga Railway & Light Company; Chattanooga Terminal Railway Company; Chautauqua Lake Navigation Company; Chatauqua Steamboat Company; Chautauqua Traction Company; Chehalis County Logging & Timber Company's Railroad; Chelan Transportation & Smelting Company's Railroad; Cherry River Boom & Lumber Company's Railroad; Cherry Run & Potomac Valley Railroad Company; Cherry Valley, Sharon & Albany Railroad Company; Chesapeake & Curtiss Bay Railroad; Chesapeake & Ohio Railway Company of Kentucky; Chippewa Valley & Northern Railway Company; Canton, Aberdeen & Nashville Railroad Company of Alabama; Carthage & Pinehurst Railroad Company; Chester Creek Railroad Company; Chester Railroad Company; Chestnut Hill Railroad Company; Chicago, Bloomington & Decatur Railway Company; Chicago, Ziegler & Gulf Railroad Company;

1525 Chicago & Duluth Transportation Company and Dennis Sullivan, Receiver; Chicago & Illinois Southern Railroad Company; Chicago & Kalamazoo Terminal Railroad Company; Chicago & Lake Superior Railway Company; Chicago & South Bend Railroad Company; Chicago, Anamosa & Northern Railway Company and G. N. Farmer, Receiver; Chicago, Duluth & Georgian Bay Transit Company; Chicago Heights Terminal Transfer Railroad Company; Chicago, Indianapolis & St. Louis Short Line Railway Company; Chicago Lighterage Company; Chicago Warehouse & Terminal Company; Chicago & Wabash Railway Company; Chihuahua Mineral Railway; Chippewa River & Northern Railway Company; Choctaw Lumber & Veneer Company's Railroad; Choctaw New Castle & Western Railroad Company; Chowahilla Pacific Railway; Cincinnati & Birmingham Air Line Railway; Cincinnati & Dayton Railway Company; Cincinnati & Southern Ohio River Railroad Company; Cincinnati & Westwood Railroad Company; Cincinnati, Bluffton & Chicago Railroad Company; Cincinnati, Findlay & Fort Wayne Railway Company; Cincinnati, Lawrenceburg & Aurora Electric Street Railroad Company and C. E. Hoover, Receiver; Cincinnati, Saginaw & Mackinaw Railroad Company; Cincinnati Southern Railway; Cinclare Central Factory Railroad; City & Suburban Railway of Washington; Clark & Pike County Railroad Company; Clark & Rocheport Railway; Clarksburg Northern Railroad; Clear Creek Lumber Company's Railroad; Clearfield & Mahoning Railway Company; Clear Lake Lumber Company's Railroad; Clearwater Valley Railroad Company; Clement Lumber Company's Railroad; Cleveland & Toledo Line; Cleveland & Mahoning Valley Railway Company; Clyde St. Johns River Line; Coal Creek Lumber Company's Railroad Company; Coast Line Railway Company; Collins & Ludowici Railroad and J. V. Kelley and M. S.

Lewis, Receivers; Coal River Railway; Cobb & Mitchell Logging Railway; Coeur d'Alene & Pend d'Oreille Railway Company; Coeur d'Alene & Spokane Railway Company; Colebrookdale Railroad Company; Colfax Consolidated Coal Company's Railroad; Colorado Eastern Railroad Company; Colorado, Kansas & Oklahoma Railroad Company; Coloratto Railroad Company; Columbia & Port Deposit Railway Company; Columbia & Red Mountain Railway; Columbia & Southern Railway Company and H. A. Middleton, Receiver; Columbia & Xenia Railroad Company; Columbus, Findlay & Northern Railroad Company; Columbus, Hope & Greensburg Railroad Company; Columbus, Marion & Bucyrus Railroad Company and G. Whysale and F. E. Guther, Receivers; Columbus Railroad Company; Colusa & Lake Railroad Company; Colorado Midland Railroad Company; Concord & Claremont New Hampshire Railroad Company; Concord & Montreal Railroad; Concord & Portsmouth Railroad; Conemaugh & Black Lick Railway Company; Congress Consolidated Mines Company, Ltd.; Connecticut & Passumpsic Rivers Railroad Company; Connecticut River Railroad Company; Connecting Railway Company; Conway Electric Street Railway Company; Cooperstown & Susquehanna Valley Railroad Company; Copper Belt Railroad Company; Cornie Valley Railroad; Coronada Railroad Company of California; Coronada Railroad of Arizona; Coshocton Railroad Company; Cotton Belt Lumber Company; Cotton State Lumber Company's Railroad; Council City & Solomon River Railroad Company; Craig & Jackson Line; Cranberry Lake Railroad Company; Cranberry Transportation Company; Crescent City & Smith River Railroad; Creston, Winterset & Des Moines Railroad and C. E. Wilson, Receiver; Crosett Railway Company; Crosett, Monticello & Northern Railway Company; Crowell & Spencer Lumber Company's Railroad; Crow's Nest Southern Railway Com-
1526 pany; Culbreth Logging Company's Railroad; Cumberland Railway Company; Cumberland Valley & Martinsburg Railroad Company; Cummer Lumber Company's Railroad; Curtiss Lumber Company's Railroad; Curtiss, Attalia Lumber Company's Railroad; Currituck Line; Cybur, Gulf & Northwestern Railway Company; Crystal River & San Juan Railroad Company; Daloga & Highland Railroad Company; Dallas, Portland & Astoria Navigation Company; Dallas Terminal Railway & Union Depot Company; Dantzeler Lumber Company's Railroad; Danville & Eastern Railway Company; Danville & Edwardsville Terminal Railway Company; Danville & Northern Railway Company; Danville & Southeastern Railway Company; Daniels Roanoke River Line; Danville & Indiana Harbor Railroad Company; Davis Brothers Logging Railroad, L. A.; Davis Lumber Company's Railroad, J. R.; Dayton & Michigan Railroad Company; Dayton & Western Railroad Company; Dayton Coal & Iron Company's Railroad; Dayton, Springfield & Xenia Southern Railway Company; Dearborn Tram & Transfer Company; Decatur Belt Railway Company; Deerfield River Railroad Company; De Funiak Springs & Northern Railroad Company; Denver, Boulder & Western

Railroad Company; Delhi, Baskin & Southwestern Railway Company; Delaware & Bound Brook Railroad Company; Delaware River Railroad & Bridge Company; Delaware Railroad Company; Delaware Valley Railway Company; De Kalb & Western Railroad Company; Del Oro Transportation Company; W. Denny & Company's Logging Railroad; Denver & Gulf Railroad Company; De Ron Lumber Company's Railroad; Deserento Navigation Company; Des Moines & Fort Dodge Railroad Company; Des Moines, Iowa Falls & Northern Railway Company; Des Moines Western Railway Company; De Soto Land & Lumber Company's Railroad; Detroit & Bay City Railroad Company; Detroit & Charlevoix Railroad Company; Detroit, Delray & Dearborn Railroad Company; Detroit, Hillsdale & Southwestern Railroad Company; Detroit Manufacturers Railroad; Detroit Terminal Railway & Transportation Company; Detroit, Toledo & Milwaukee Railroad Company; Detroit, Toledo Railroad Company; Detroit Union Railroad, Depot & Station Company; Devils Lake & Chautauqua Transfer Company; Diamond & Calder Railroad Company; Dixie Route; Dolgeville & Salisbury Railway Company; Dominion Transportation Company; Donaldson Railroad; Dorcheat Valley Railroad Company; Dougha Land Company's Railroad; Douglas Land Company's Railroad; Douglas Transportation Line; Dowling Lumber Company's Railroad; Drummond & Southwestern Railway Company; Dublin & Southwestern Railroad Company; Duluth & Northern Railroad Company; Duluth Belt Line Railroad Company; Duluth, Fergus Falls & Southern Railway Company; Duluth, St. Cloud, Clences & Mankato Railway Company; Duluth Street Railway Company; Dunbar & Wausaukee Railway; Dunnellon Phosphate Company Railroad; Durham & Charlotte Railroad; Durham Railroad Company; Durham Transportation Company; Dyer Transportation Line; Eagle Lumber Company's Railroad; Eagle Sale Works Railroad Company; Eagles Mere Railroad Company; and E. Bailey, Receiver; East Berline Railway; East Chicago Belt Railroad Company; East Coast Navigation Company; East Georgia Railway Company; East Mahoney Railroad Company; East Pennsylvania Railroad Company; East River Terminal Railroad; East Short Line; East Trenton Railroad Company; Eastern Massachusetts Street Railway Company; Eastern Railroad Company; Eastern Wisconsin Electric Company; Eastern & Western Lumber Company's Railroad;

Eastern Texas Railroad Company; Edgewater Terminal Railroad Company; Edgewater Connecting Railway Company; Ed-
1927 wardsville Belt Railroad Company; Elberton Air Line Railroad Company; El Dorado Lumber Company's Railroad; El Dorado, Marion & Southwestern Railway Company; Elk & Highland Railroad Company; Elkhart & Western Railroad Company; Elkton & Guthrie Railway Company; Elkton & Middleton Railroad Company of Cecil County; Elk Valley Coal & Iron Company's Railroad; Ellaville, Westlake & Jennings Railway; Ellenville &

Kingston Railroad Company; Ellisville Lumber Company's Railroad; Ellwood Connecting Railroad Company; Elmira & Lake Ontario Railroad Company; Elmira & Williamsport Railroad Company; Elmira & Seneca Lake Traction Company; Elmira Water, Light & Railroad Company; Elmore & Southwestern Railroad; El Paso & Juarez Traction Company; El Paso Electric Railway Company; El Paso, Kansas City Short Line; Empire & Southeastern Railroad Company; Empire Lumber Company's Railroad; Emporium & Rich Valley Railway Company; England & Clear Lake Railway Company; Englewood, Alexandria & Southwestern Railroad Company; Eppa & Northwestern Railroad Company; Erie & Central Pennsylvania Railroad Company; Erie & Kalamazoo Railroad Company; Erie Railroad Transit Line; Erie Railroad Transit Canal Line; Erie Traction Company; Eastern Railroad Company; Eastern Wisconsin Electric Company; Estre Navigation Company; Escambia Land & Manufacturing Company's Logging Railroad; Estacado & Gulf Railroad Company; Euclid Railroad Company; Eureka & Freshwater Railway Company; Eureka & Palisade Railway Company; Eureka Nevada Railroad; Eureka Lumber Company's Railroad; European & North American Railway Company; Evansville & Bowling Green Packet Company; Evansville, Indianapolis & Terre Haute Railway Company; Evansville Terminal Railway; Fairland, Franklin & Martinsville Railroad Company; Fairmont & Manningston Railroad Company; Fairmont, Shinneton & Clarksburg Railway Company; Farnsworth Lumber Company's Railroad; Fayetteville & Little Rock Railway Company; Fayette County Railroad Company; Fentress County Railroad Company; Finkbine Lumber Company's Railroad; Florida & Georgia Railway Company; Florida Coast Island Navigation Company; Florida Railway Company; Flovilla & Indiana Springs Railway Company; Flowers Brothers Lumber Company's Railroad; Flynn Lumber Company's Railroad; Fort Collins Development Railway Company; Fort Scott Central Railway Company; Fort Smith & Western Railroad Company and A. L. Mills, Receiver; Fort Smith Union Depot Company; Fort Wayne & Decatur Traction Company; Fort Wayne & Jackson Railroad Company; Fort Wayne & Detroit Railroad Company; Fort Worth & Denver Terminal Railway Company; Fostoria & Fremont Railway Company; Fostoria & Northern Transportation Company; Foster Latimer Lumber Company's Railroad; Fox Creek Railroad; Frank Waterhouse & Company; Franklin & Tilton Railroad Company; Freehold & Jamesburg Agricultural Railroad Company; Freeo & Delta Railroad Company; French Broad Railroad Company; Frenchton & Arlington Railroad; Fulton Navigation Company; Furon Boat Line; Galesburg & Western Railroad Company and T. M. Cox, Receiver; Galveston & Western Railway Company; Galveston, Beaumont Northeastern Railway Company; Galveston Terminal Railroad Company; Galveston Wharf Company; Garnerville Railroad Company; Gary & Interurban Railway Company;

Gary Connecting Railway Company; Gary & Western Railway Company; Gennessee Valley Canal Railroad Company; Gennessee Valley Terminal Railroad Company; Geneva Lumber Company's Railroad; Georges Valley Railroad Company; Georgia Granite Railroad Company and F. T. Mason, Receiver; Georgia
1528 Marble Company's Railroad; Georgia Railroad & Banking Company; Georgetown & Tennallytown Railway Company; Gilpin Railroad Company; Glasgow Railway Company; Glendale Railroad Company; Glenfield & Western Railroad Company; Glenn Springs Railroad Company; Glenwood Railroad Company; Gloversville & Bradalbin Railroad Company; Goble, Nehalem & Pacific Railway Company; Golconda & Adelaide Railroad; Golden Circle Railroad Company; Goldfield Consolidated Miling & Transportation Company; Goose Lake & Southern Railway Company; Goshen & Deckertown Railway Company; Goshen, South Bend & Chicago Railway Company; Gouverniur & Oswegatchia Railroad Company; Grafton & Belington Railroad Company; Grand Rapids & Northwestern Railroad; Grand Rapids, Kalkaska & Southeastern Railroad Company; Grand River Valley Railway Company; Grande Ronde Lumber Company's Railroad; Grand Trunk Junction Railway Company; Grand Trunk Pacific Railway Company; Granite City & East St. Louis Terminal Railroad Company; Granite City & Mississippi River Railroad; Granite Railway Company; Grass Creek Terminal Railway Company; Gray Lumber Company's Tram Road; Green Bay Transportation Company; Grays Point Terminal Railway Company.

The Greene Railroad Company; Greenfield & Southeastern Railway; Greenville Southern Railway Company; Greenville, Spartanburg & Anderson Railway Company; Greenville & Vanceboro Railroad Company; Greenville Northwestern Railway Company and N. W. Moursund, Receiver; Greenville & Western Railway Company; Greenwood Railroad Company; Greigsville & Pearl Creek Railroad Company; Griffin, Magnolia & Western Railway Company; Groves Creek Railroad; Gualala River Railroad; Gulf & Chicago Railway Company; Gulf, Beaumont & Great Northern Railway Company; Gulf, Brownwood & Cisco Railway Company; Gulf Line Railway Company; Gulf Coast Transportation Company; Gulf Cypress Lumber Company; Gulf, Hutchinson & Northwestern Railroad; Gulf, Sabine & Red River Railroad; Gunflint & Lake Superior Railroad Company; Hammond & Eastern Railroad; Hammond Lumber Company's Railroad; Hancock & Calumet Railroad Company; Hanging Rock Iron Company; Hannibal Union Depot Company; Hanover Railway Company; Hardy Creek & Eel River Railroad Company; Harkin Transportation Company; Harlem River & Port Chester Railroad Company; Harrisburg, Portsmouth, Mt. Joy & Lancaster Railroad Company; Harrison Branch Railroad Company; Hartford & Connecticut Western Railroad Company; Hartford & New York Transportation Company; Hartford Eastern

Railway Company; Haynesville & Montgomery Railroad Company; Hayts Gernerz, Ovid & Willard Railroad Company; J. H. Heald & Company's Railroad; Heck Belt Line Railroad Company; Hetch Hetchy & Yosemite Valley Railway Company; Hibernian Mine Railroad Company; Hibernia Underground Railroad Company; Hicks Run Railroad Company; Higginsville Switch Company's Railroad; High Bridge Railroad Company; Hixon, Sumter & Northwestern Railway; Hoboken Railroad, Warehouse & Steamship Connecting Company; Helston Valley Railway Company; Holyoke & Westfield Railroad Company; Homar & Southeastern Railroad; Home Avenue Railroad Company; Hopatsong Railroad Company; Hornell & Dansville Railroad Company; Horn Pond Branch Railroad Company; Houlton Lumber Company's Railroad; Hudson Portland Cement Company's Railroad; Hudson River Bridge Company; Humbolt Logging Railway Company; Huntington & Big Sandy Railroad Company; Hyner Run Railroad; Idaho & Northwestern Railway Company; Idaho Southern Railroad Company and S. C. McWatters, Receiver; Illinois Traction System; Illinois Western Railway
1529 Company; Illwaco Railroad Company; Indiana Stone Railroad Company; Indianapolis, Crawfordsville & Danville Electric Railway Company; Indianapolis, Newcastle & Eastern Traction Company; Indian Creek & Pond River Railroad Company; Industrial Lumber Company's Tram Road; Independence & Monmouth Railway; Indiana Service Corporation; Indianapolis & Louisville Railway Company; Inland Lines Limited; Inland Railway Company; Inman Packet Company; Interior & West Virginia Railroad Company; International Mercantile Marine Company; International Navigation & Trading Company; International Railway of Maine; International Transportation Company; Inter Ocean Steamboat Company; Interstate Consolidated Street Railway Company; Inverness Railway & Coal Company; Ione & Eastern Railroad Company; Iowa & Southwestern Railroad Company; Iowa Central & Western Railway; Iowa Midland Railway; Iowa Railway & Light Company; Iowa Traction Company; Iowa Transfer Railway Company; Iron Belt Railroad; Iron Mountain & Green Briar Railroad Company; Iron Mountain Railway Company; Island Creek Railroad Company; Island Railroad Company; Ivorydale & Millcreek Valley Railway Company; Jackson, Lansing & Saginaw Railroad Company; Jackson & Southeastern Railroad Company; Jacksonville & Mayport Steamboat Company; Jacksonville & Midland Railway Company; Jamestown & New Port Ferry Company; Jamaica & South Shore Railroad Company; Jamestown, Franklin & Clearfield Railroad Company; Jasper & Eastern Railway Company; Jennings & Northeastern Railroad Company; Jennings Brothers Railroad; Johnson, Lagoon & Northern Railway Company; Johnsonburg Railroad Company; Johnstown, Gloversville & Kingsboro Horse Railroad Company; Joliet & Northern Indiana Railroad Company; Kansas City & Southwestern Railway Company of Kansas; Kala-

mazoo, Allegheny & Grand Rapids Railroad Company; Kalamazoo & South Haven Railroad Company; Kanawha Traction & Electric Company; Kankakee & Seneca Railroad Company; Kansas City, Burlingame & Western Company; Kansas City, Mexico & Orient Railroad Company and W. T. Kemper, Receiver; Kansas City, Mexico & Orient Railway Company of Texas; Kansas City, Rock Island Railway Company; Kansas City, St. Louis & Chicago Railroad Company; Kansas City, Tulsa & Southwestern Railroad Company; Kansas Southern & Gulf Railroad Company and G. E. Morris, Receiver; Kaslo & Slocan Railroad Company; Keaseville, Ausable Chasm & Lake Champlain Railroad Company; Keller Chemical Company's Railroad; Kendall & Sulphur Springs Railway Company; Kennebunk & Kennebunkport Railroad Company; Kenneys Creek Railroad Company; Kentucky Lumber & Veneer Company's Railroad; Kentucky Valley Railroad Company; Keokuk & Hamilton Bridge Company; Keokuk Union Depot Company; Kettle Valley Railway Company; Kingston & Snow Hill Railroad Company; Kinkora & New Liston Railroad Company; Kinzie Brothers Steamboat Company; Kinzua Railway Company; Kinzua Hemlock Railroad Company; Kinzua Valley Railroad Company; Kirby Lumber Company's Tram Road; Kittanning Run Railroad Company; Klamath Lake Railroad Company; Knox Railroad Company; Koolah Railway Company, Ltd.; Kootenai Valley Railway Company; Koreshan Unity Railway Company; La Fayette Union Railway Company; La Follette Coal, Iron & Railway Company; Laganda & Western Railway Company; Lake Champlain Steamboat Line; Lake Erie, Bowling Green & Napoleon Railway Company and C. G. Taylor, Receiver; Lake Griffin Transportation Company; Lake Hancock & Claremont Railway Company; Lake Houtseng Railroad Company; Lake Michigan Car Ferry Transportation Company; Lake Ontario &
1530 Bay of Quinte Steamboat Company, Ltd.; Lake Transfer Company; Lake Whatcom Logging Company's Railroad; Lancaster & Quarryville Railroad Company; Lancaster, Oxford & Southern Railway Company; Lansing Manufacturing Railroad Company; Lansing Transit Railway Company; Laona & Northern Railway; Lathrop-Hattes Railway Company; Latrobe-Connellsville Coal & Coke Company's Railroad; Lauderdale & Northwestern Railroad Company; Laurel & Tallahoma Western Railway; Laurel Railway Company of Virginia; Laurelton & Pine Creek Railroad; Learned Logging Company's Railroad; Leavenworth, Kansas & Western Railway Company; Lebanon Thornton Traction Company; Leech Lake & Northern Railway Company; Leesville East & West Railroad Company; Lehigh & New York Railroad Company; Lehigh & Oxford Railroad Company; Lehigh & Pavilion Railroad Company; Lehigh Coal & Navigation Company; Lehigh Valley Railway Company; Leland Southwestern Railroad Company; Lewisburg & Roneaverta Electric Railway Company; Lewisburg & Tyrone Railroad Company; Lewiston & Auburn Railroad Company; Lewiston & Southeastern Railroad Company; Lexington Union Station Com-

pany; Liberty White Railroad Company; Licking River Railroad Company; Lima Belt Railway Company; Lima Honeoye Light & Railroad Company; Lima Southern Railway Company; Lincoln Northern Railway Company; Litchfield & Madison Railway Company; Lithonia & Arabia Mountain Railway; Little Falls & Dolgeville Railroad Company; Little River Railway Company of Arkansas; Little Rock, Sheridan & Saline River Railway Company; Little Schuylkill Navigation Railroad & Coal Company; Livingston & Southeastern Railway Company; Livonia & Lake Conesus Railroad Company; Lockhart Railroad Company; London & Port Stanley Railway; Long Branch Coal & Railroad Company; Long Island Company, North Shore Branch; Longwood Valley Railroad Company; Lorain & Ashland Railroad Company; Lorain & Southern Railroad Company; Lorama Railroad Company; Lordsburg & Pyramid Railroad; Los Angeles & San Diego Beach Railway Company; Lotbinier & Magantic Railway Company; Louisiana & Eastern Railway; Louisiana & Mississippi Railroad Transfer Company; Louisiana Central Railroad Company; Louisiana Central Railway Company; Louisiana Nickel Plate Railway Company; Louisville Bridge Company; C. H. Loveland's Railroad; Lowell & Andover Railroad Company; Ludington Transportation Company;

Lucaston Railroad Company; Ludington & Northern Railroad Company; Ludlow & Southern Railway Company; Lushermann & Western Railway Company; Laurinburg & Southern Railroad Company; McKean & Buffalo Railroad Company; McKeesport & Clairton Connecting Railway Company; C. V. McMillam Company's Logging Railroad; McRae Terminal Railway Company; McCrory & Reedsville Southern Railway Company, and H. W. Hermingham, Receiver; Macomb & Western Illinois Railway Company; Mahoning Coal Railroad Company; Mahoning State Line Railroad Company; Mahoning Valley Railway; Mahopac Falls Railroad Company; Maine Steamship Company; Mammoth Cave Railroad Company; Manahawkin & Long Beach Transportation Company; Manchester & Lawrence Railroad Company; Manchester, Dorsett & Granville Railroad Company; Mangham & Northeastern Railway Company; Manhattan Navigation Company; Manistee & Luther Railroad Company; Manitoba Great Northern Railroad Company; Manitou Steamship Company; Manns Creek Railroad; Mapleton & Rock Ridge Railway Company; Marathon County Railway Company; Marbury & Kingston Railroad; Marengo, Choctaw & Meridian
1531 Line Railway Company; Marginal Railroad; Maricopa & Phoenix Railroad Company; Marion Railway Corporation; Marietta, Columbus & Cleveland Railroad Company, and D. P. Terpy, Receiver; Marine Railway Company; Marine Merchants Terminal Company; Marion & Bluffton Traction Company; Marlborough Railroad Company; Maryland & Pennsylvania Terminal Railway Company; Mary Lee Railroad; Marshall & East Texas Railway Company; Marquette & Bessemer Dock Railroad & Navigation Company; Mason Lumber Company's Railroad; Maumee Valley Railway

& Light Company; Mayville & Lexington Railroad Company; Meacham Lumber Company's Railroad; Meadows Land & Zeddiker Railroad Company; Meadville & Summerville Railroad Company; Memphis & Charleston Railway Company; Memphis & Lake View Railway Company; Memphis & State Line Railroad Company; Memphis Union Station Company (Terminal Company); Merchants Mutual Line; Mesaba Railway Company; Meto Valley Railway Company and J. A. Watkins, Receiver; Metropolitan Rapid Transit Light & Power Company; Mexican American Steamship Company; Mexican Railway Company; Mexican Northwestern Railway Company; Michigan City, Chicago & Western Transportation Company; Michigan, Indiana & Illinois Line; Midland Railway Company; Middlebrook, Graniteville & Belleview Railroad Company; Middleburgh & Schoharie Railroad Company; Middletown, Unionville & Water Gap Railroad Company; Midway & Sakdale Railway Company; Milford & Woonsocket Railroad Company; Milford, Attleboro & Woonsocket Street Railway Company; Milford, Franklin & Providence Railroad Company; Mill Creek & Little River Railway & Navigation Company; Mill Creek & Mine Hill Railroad Company; Millstone & New Brunswick Railroad Company; Mills Steamboat Company; Milltown Air Line Railway; Mills Valley & Mt. Tamakpais Scenic Railway Company; Millner & North Side Railroad Company; Minden East & West Railway Company; Minneapolis, Anoka & Cuyuna Range Railway Company; Minneapolis, St. Paul & Ashland Railway Company; Minnesota & Manitoba Railroad Company; Minnesota & Northwestern Railroad Company; Minnesota & Wisconsin Railroad Company; Minnesota, Dakota & Pacific Railroad Company; Minnesota Transfer Railway Company; Minster & Laramie Railway Company; Minster City, Southern & Western Railroad Company; Mississippi & Alabama Railroad Company; Mississippi Sugar Belt Railroad; Mississippi Valley Railroad Company; Missouri River Packet Company; Modic Northern Railway Company; Mohawk Mining Company's Railroad; Mohawk & Malone Railway Company; Monocacy Valley Railroad Company; Mono Lake Railway & Lumber Company; Monroe & Greenville Railroad Company; The Monroe & Southwestern Railway Company; Montana Eastern Railroad Company; Montana Railway Company; Montauk Steamboat Company, Ltd.; Monte Ne Railway Company; Montgomery & Erie Railway Company; Montreal & Atlantic Railway Company; Montreal & Planters Steamboat Company; Montrose Railroad Company; Moosic Mountain & Carbondale Railroad Company; Morgan Run Railroad Company; Morris & Essex Railroad Company; Morris & Essex Extension Railroad Company; Moshannon Coal Mining Company; Mount Carbon & Port Carbon Railroad Company; Mount Carmel Railroad Company; Mount Gilead Short Line Railroad Company; Mount Holly, Lumberton & Madford Railway Company; Mount Penn Gravity Railroad Company; Mount Pleasant & Broad Ford Railroad Company; Mount Pleasant

1532 Southern Railway Company; Mount Washington Railway Company; Mountain Central Railway Company; Mountain Quarries Company; Mexahala & Bristol Railway Company; Muncie Belt Railway Company; Nantucket Railroad Company; Nantucket Central Railroad Company; Nashua & Acton Railroad; Nashua, Acton & Boston Railroad Company; Nashville & Decatur Railway Company; Nashville & Lowell Railroad Corporation; Nashville Terminal Company; Nashville Terminal Realty Company; Nassau Electric Railroad Company; Natchez, Ball & Shreveport Railway Company; Natchez Pass Railway Company; Natchitoches Railway & Construction Company; National City & Otay Railway Company; National Railroad Company of New Mexico; National Railways of Mexico; National Tube Company's Railroad; Native Lumber Company's Railroad; Natural Bridge Railway Company; Nelson & Fort Sheppard Railway Company; Nesquehoning Valley Railroad Company; Nevada & California Railway Company; Nevada Short Line Railway Company and H. J. Humphreys, Receiver; Newark & Bloomfield Railroad Company; Newark & Hudson Railroad Company; Newark & New York Railroad Company; New Berlin & Winnifield Railroad Company; New Boston Railroad Company; New Castle & Butler Railway Company; Newell Bridge & Railway Company; New England Granite Railroad Company; New Hanover Transit Company's Railroad; New Haven & Dunbar Railroad Company; New Haven & Northampton Company; Newhouse, Copper Gulch & Savior Lake Railroad Company; New Jersey & Pennsylvania Railroad Company and F. V. Pitney, Receiver; New Jersey Junction Railroad Company; Newport & Shermans Valley Railroad Company; Newport News & Hampton Railway Gas & Electric Company; New Westminster Southern Railway Company; Newton Falls & Northern Railroad Company; New York & Cuba Mail Steamship Company; New York & Harlem Railroad Company; New York & Rockaway Beach Railway Company; New York Bay Railroad Company; New York, Brooklyn & Manhattan Beach Railway Company; New York Central & Niagara River Railroad Company; New York Connecting Railroad Company; New York Dock Company's Terminal Railway; New York, Lackawanna & Western Railroad Company; New York Short Line Railroad Company; Niagara Falls Branch Railroad Company; Niagara Navigation Company, Ltd.; Nittany Valley Railroad Company; Noland Land & Transfer Company; Norfolk & Mobjack Steamboat Company; Norfolk County Timber Corporations Railroad; Normans Southeastern Railway Company; Norristown & Main Line Railroad Company; Norristown Junction Railroad Company; North Bend & Eastern Railroad Company; North Brookfield Railroad Company; North Carolina Railroad Company; North Coast Powder Company; North Coast Railroad Company of the State of Washington; Northeast Texas Railway Company; North Pacific Steamship Company; Northern Coal & Iron Company's Railroad; Northern Dakota Railway Com-

pany; Northern Steamship Company; Northern Electric Railway Company and U. P. Coughlan, Receiver; Northern Maine Seaport Railroad Company; Northern Michigan Transportation Company; Northern Mississippi Railway Company; Northern Railroad; North Louisiana Railroad Company; North Pennsylvania Railroad Company;

North State Railroad Company; Northern Ohio Railway Company; Northwestern Coal & Mining Company's Railroad; Northwestern Coal Railway Company; Northwestern Improvement Company; Northwestern Lumber Company's Railroad; Northwestern Ohio Railway & Power Company; Northwestern Pennsylvania
1533 Railway Company; Northwestern Toll Line Company; Morton & Northern Railway; Norway Branch Railroad Company; Norwich & New York Propeller Company; Norwich & Worcester Railroad Company; Nowata Pipe Line Company; Nyack & Northern Railroad Company; Oakdale & East Side Railroad Company; Oak Grove & Georgetown Railroad Company; Oakland, Antioch & Eastern Railway; Oberlin & La Grange Railway Company; Ocalla & Southwestern Railroad Company; Ocalla Northern Railroad Company; Ogden & Northwestern Railroad Company; Ohio & Baltimore Short Line Railway Company; Ohio River & Columbus Railway Company; Ohio River Passenger Railway Company; Ohio Sterling Railway Company; Oklahoma & Great Eastern Railroad Company; Oklahoma Railway Company; Oklahoma Southwestern Railway Company; Old Dominion Steamship Company; Old River & Kissatchi Railway; Olean, Bradford & Warren Railway Company; Oleona Railroad Company; Oliver Iron & Steel Company's Railroad; Olive Sternsberg & Company's Timber Company; Omaha Bridge Terminal Company; Old Colony Railroad Company; Oneida Railway Company; Onoway & North Michigan Railway Company; Ontario, Carbondale & Scranton Railway Company; Open River Railway & Navigation Company; Orangeburg Railway; Ore Belt Railroad Company; Oregon Eastern Railway Company; Oregon State Portage Railway; Oregon Trunk Railway Company; Oregon-Washington Railway Company; Orovills & Nelson Railroad Company; Oshkosh Transportation Company; Ostrander Railway & Timber Company; Oswego & Rome Railroad Company; Oswego & Syracuse Railroad Company; Ouachita Valley Railway Company; Owensboro & Nashville Railroad Company; Owl Bayou Railroad; Ozark Valley Railroad Company and R. A. Long, Receiver; Pacific & Eastern Railway; Paroda Railroad Company; Parkersburg Branch Railroad Company; Passaic & Delaware Railroad Company; Passaic & Delaware Extension Railroad Company; Passenger Belt Railway Company; Pattersons Creek & Potomac Railroad Company; Paw Paw Railroad Company; Pearl River & Gulf Railway Company; Pearl River Lumber Company's Railroad; Pearl River Transportation Company; Peelsport Connecting Railway Company; Pe Ell & Columbia River Railway; Pemberton & Hightstown Railroad Company (Union Transportation Company,

Lessee); Pemigowasset Valley Railroad Company; Peninsular Lumber Company's Railroad; Peninsular Railroad Company; Pennsylvania & Atlantic Railroad Company (Union Transportation Company, Lessee); Pennsylvania & New York Canal & Railroad Company; Pennsylvania Eastern Railroad Company; Pennsylvania, Monongahela & Southern Railroad Company; Pennsylvania Tunnel & Terminal Railroad Company; Pennsylvania Western & Ohio River Connecting Railway Company; Penn Yan & Lake Shore Railway; Pensacola & Perdido Railroad Company; Pensacola, Alabama & Tennessee Railroad Company; Peoples Railway Company; Peoria, Bloomington & Champaign Traction Company; Peoria, Lincoln & Springfield Traction Company; Peoria Northern Railway Company; Peoria Southern Railway Company; Pere Marquette Railroad of Indiana; Perla Southern Railroad Company; Perth Amboy & Woodbridge Railroad Company; Petersborough & Hillsborough Railroad Company; Petersborough Railroad Company; Philadelphia & Baltimore Central Railroad Company; Philadelphia & Beach Haven Railroad Company; Philadelphia & Brigantine Railroad Company; Philadelphia & Delaware County Railroad Company; Philadelphia & Frankfort Railroad Company; Philadelphia & Long Branch Railroad Company; Philadelphia & Reading Terminal Railroad; Philadelphia & Trenton Railroad Company;
Philadelphia, Germantown & Norristown Railroad Com-
1534 pany; Philadelphia, Harrisburg & Pittsburgh Railroad Company; Philadelphia, New Orleans Transportation Company; Philip Carey Manufacturing Company's Industrial Railway; Phillipsburg & Susquehanna Valley Railway Company; Phillipsburgh Railroad Company; Pickens & Addison Railway Company; Pickens & Hackers Valley Railroad Company; Piedmont & Northern Railway Company; Pine Bluff & Arkansas River Railway Company; Pinehurst Railroad Company; Pine Bluff, Sheridan & Southern Railway; Pine Run Railroad Company; Pioche & Pacific Transportation Company; Piqua & Troy Branch Railroad Company; Pittsburgh & Castle Shannon Railroad Company (Electric); Pittsburgh & Connellsville Railroad Company; Pittsburgh & Grass Creek Railroad Company; Pittsburgh & Freeport Railroad Company; Pittsburgh & Northern Railroad Company; Pittsburgh & Northeastern Railroad Company; Pittsburgh, Birmingham & Eastern Railroad Company; Pittsburgh County Railway Company; Pittsburgh, McKeesport & Youghiogheny Railroad Company; Pittsburgh Railroad Company; Pittsburgh Terminal Railroad & Coal Company; Pittsburgh, Westmoreland & Somerset Railroad Company; Pittsfield & North Adams Railroad Company; Pittsford & Rutland Railroad Company; Placerville & Lake Tahoe Railway; Plattsburgh & Dannemora Railroad Company; Plymouth Railroad Company; Poebuck Railroad Company; Point Pleasant, Buchannon & Tygert Valley Railroad Company; Pollock & Angelina Valley Transportation Company; Pomeroy & Newark Railroad Company; Ponce & Guayama Railroad Company; Poplar Bluff & Dan River Railway Company;

Poplarville Lumber Company's Railroad; Port Arthur, Duluth & Western Railway Company of Minnesota; Portland & Northern Railway Company; Portland & Southeastern Railroad Company; Portland Union Railway Station Company; Port Arthur Canal & Dock Company; Portsmouth & Tagart Valley Railroad Company; Potomac, Fredericksburg & Piedmont Railroad Company; Potomac Railroad Company; Prescott & Reader Railroad Company; Prescott, Reader & Fordyce Railway Company; Prince Edward Island Railway Company; Proctor Coal Company's Railroad; Providence Coal Company's Railroad; Providence & Worcester Railroad Company; Providence, Warren & Bristol Railroad Company; Providence, Webster & Springfield Railroad Company; Pueblo Union Depot & Railroad Company; Puget Sound & Baker River Railway Company; Puget Sound International Railway & Power Company; Pacific Coast Company; Pacific Logging & Timber Company's Railroad; Pacific Portland Cement Company's Railroad; Pacific Mail Steamship Company; Paducah Union Depot Company; Palmer Lumber Company's Railroad; Panther Creek Lumber Company's Railroad; Panther Creek Railroad; Parker Bell Lumber Company's Railroad; Quakertown & Eastern Railroad Company; Qu'Appelle, Long Lake & Saskatchewan Railroad Company; Quebec Central Railway Company; Quebec Oriental Railway Company; Quebec Steamship Company, Ltd.; Quebec & Torch Lake Railroad Company; Quincy Quarries Company's Railroad; Railway Transfer Company of Minneapolis; Raleigh & Western Railway Company; Rapid City Black Hills & Western Railroad Company; Rapides Lumber Company's Railroad; Raritan Terminal & Transportation Company; Rawhide Western Railway Company; Raymondville & Waddington Railroad Company; Reading Belt Railway Company; Red Mountain Railway Company; Red River & Rocky Mount Railroad Company; Red River Lumber Company's Railroad; Red River Valley Railroad Company of Arkansas; Red River Valley Railroad Company of Kentucky; Red Springs & Bowmore Railroad; Register & Glennville Railroad Company; Rensselaer & Saratoga Railroad Company; Reynoldsville & Falls Creek Railroad Company; Rhode Island & Massachusetts Railroad Company (in Mass.); Richelieu & Ontario Navigation Company, Ltd.; Richmond, Fredericksburg & Potomac & Richmond & Petersburg Connecting Company; Richmond & Rappahannock River Railway Company; Richmond, Rappahannock & Northern Railway; Richmond Washington Railway; Rich Patch Railroad; Ridgway & Clearfield Railroad Company; Rio Grande & Pagosa Springs Railway Company; Rio Grande & Santa Fe Railroad Company; Rio Grande & Southwestern Railroad Company; Rio Grande Gunnison Railroad Company; Rio Grande Junction Railroad Company; Rio Grande, Pueblo & Southern Railroad Company; Rio Grande Railroad Company of Texas; Rio Grande Railway Company; Rio Grand Rengre De Cristo Railroad Company; Rison & Mt. Elba Railroad Company; Riverside & Arlington Railroad Company; Riverside & Gulf Railway Com-

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pany; Roanoke Railroad & Lumber Company; Roanoke River Railroad Company; Robbins Railroad Company; Robinson Lake & Lumber Company's Railroad; Roby & Northern Railroad Company; Rochester, Hornellsville & Lackawanna Railroad Company; Rochester, New York & Pennsylvania Railroad Company; Rockaway River & Montville Railroad Company; Rockdale Railroad Company; Rockford Belt Railway Company; Rock Island Company; Rock Island Frisco Terminal Railway Company; Rockport, Langdon & Northern Railway Company; Rockport Railroad Company; Rockport, Shenandoah & Des Moines Railway Company; Rockwood & Tennessee River Railway; Rocky Hill Railroad & Transportation Company; Rocky Mount & Northern Railroad; Rocky Mountain Railway Company; Roddis Lumber Company's Railroad;

Rome & Clinton Railroad Company; Rome, Watertown & Ogdensburg Railroad Company; Roper Lumber Company's Railroads; Rose Creek Railroad; Roosevelt & Western Railroad; Rose Hill Sugar Company's Railroad; Roswell Railroad Company; Rowland Lumber Company's Railroad; Rowlesburg & Southern Railroad; Ruddock, Bonnet Carre & Northern Railroad; Rumbarger Lumber Company's Railroad; Rutland Transit Company; Rutland & Whitehall Railroad Company; Sacramento & Woodland Railroad Company and J. P. Coghlan, Receiver; Sacramento Southern Railroad Company; Sacramento Valley Electric Railroad Company; San Antonio Railway Company; San Antonio, Uvalde & Gulf Railroad Company and A. R. Ponder, Receiver; Santa Maria Union Depot Company; Saginaw & Manistee Lumber Company's Railroad; Saginaw & Ouachita River Railroad Company; St. Charles Air Line Railroad; St. Clair & Western Railroad; St. Croix Duluth Railway; St. Francis River Railroad; St. Joseph & Central Branch Railway Company; St. Joseph & Union Depot Company; St. Joseph Chicago Steamship Company; St. Louis & Claire Railroad Company; St. Louis & Illinois Belt Railway; St. Louis & Oklahoma Southern Railway; St. Louis, Decatur & Champaign Railway Company; St. Louis, El Reno & Western Railway Company and A. L. Mills, Receiver; St. Louis, Memphis & Southeastern Railroad Company; St. Louis, San Francisco & New Orleans Railroad Company; St. Louis Terminal Transfer Company; St. Marys & Eastern Railroad Company; St. Marys & Western Railroad Company; St. Marys & Kingsland Railroad Company; St. Marys River Steamboat Company; St. Paul Bridge & Terminal Railway Company; St. Paul Union Depot Company; St. Petersburg Transportation Company; St. Tammany & New Orleans Railway & Ferry Company; Santa Fe Refrigerator Despatch Company; Salina Bayou Railway Company; Saline River Railway Company; Saline Valley Railroad Company; Salisbury &
1536 Albert Railway; Salisbury Railroad Company; Salmon Brick & Lumber Company's Railroad; Salt Lake & Mercur Railroad Company and L. Landis, Receiver; Salt Lake City Union Depot & Railroad Company; San Bernardino & Redlands Railroad Company;

Sandersville Railroad Company; Sandusky, Norwalk & Mansfield Electric Railway Company and C. G. Taylor, Receiver; Sanford & Troy Railroad Company; San Francisco & Eureka Railway Company; San Francisco & Napa Railway Company; San Francisco, Napa & Calistoga Railway; Santa Fe, Liberal & Englewood Railroad Company; Santa Fe, Raton & Des Moines Railroad Company; Sarasota & Boyne Transportation Company; Saratoga & Schenectady Railroad Company; Saugerties & New York Steamboat Company; Savage River Railroad Company; Savannah, Hinesville & Western Railroad Company; Sawyer River Railroad Company; Schoharie Valley Railway Company; Schuylkill & Lehigh Railroad Company; Schuylkill Valley Navigation & Railroad Company; Scottac Railway Company; Scott County Railroad; Scotts City Northern Railway Company; Scranton & Spring Brook Railroad Company; Scranton, Dunmore & Moosic Lake Railroad Company; Seaboard Company; Seaboard & Gulf Steamship Company; Seattle Southeastern Railway Company; Sevier Railway Company; Shamokin, Sunbury & Lewisburg Railroad Company; Shamokin Valley & Pottsville Railroad Company; Shamrock & Western Railway Company; Shaver Lake Railroad; Shelby County Railway Company; Shenandoah Iron & Coal Company's Railroad; Sheridan & Williamina Railroad Company; Shingiehouse Railroad; Shreveport Bridge & Terminal Railroad; Sierra Nevada Wood & Lumber Company's Railroad; Sierra Valley Railway Company; Sieata Longboat Steamship Company; Silber City Mines, Altos & Mongollon Railroad Company; Silver Lake Railway Company; Silver Lake Railway & Lumber Company; Silver Peak Railroad Company; Silver Springs & Western Railroad Company; Silverton Lumber Company's Railroad; Simpson Railroad; Sharon & Wheatland Street Railway Company; Skagit River Navigation & Trading Company; Skinner Car Ferry Company; Slate Run Railroad Company; Sligo Furnace Company's Logging Railroad; W. T. Smith Lumber Company's Railroad; Smithonia & Duniap Railroad Company; Smithonia, Danielsville & Gainesville Railroad Company; Somerset & Cambria Railroad Company; Songo River Line, Incorporated; Snake River Valley Railway Company; Shore Line Railroad Company; South Branch Railroad Company of New Jersey; South Branch Railway Company; South Easton & Phillipsburg Railroad Company; South Carolina Western Railway Company; Southeastern Ohio Railway Company; Southern Illinois & Missouri Bridge Company; Southern Illinois Railway & Power Company; Southern Oregon Traction Company; Southern Pennsylvania Railway & Mining Company; Southern Railway & Power Company; Southern States Lumber Company's Railroad; South Florida & Gulf Railway Company; South Park & Leadville Short Line Railroad; South San Francisco Belt Railway; Southwestern Railway Company of Oregon; Southern Extension Railway Company; Southern Railway & Navigation Company; Southeastern Railway Company of Texas; South Wilmington

& Southern Railroad Company; Sparrow Kroll Logging Railway; Spokane, Falls & Northern Railway Company; Springfield & Northeastern Railway Company; Springfield Belt Railway Company; Springfield, Troy & Piqua Railroad Company; Spuytan Duyvil & Port Morris Railroad Company; Standard & Hernando Railroad Company; Standard Railway & Timber Company; State Line & Sullivan Railroad Company; Steple Valley Smelting & Mining Company's Railroad; Steubenville & Wheeling Traction Company; Steubenville Extension & Pennsylvania Railroad; Steubenville, Wellsburg & Weirton Railway Company; A. W. Stevens Lumber Company's Railroad; Stockyards Terminal Railway Company; Stonington & Watch Hills Ferry Company; Straight Creek Coal & Coke Company's Railroad; Strasburg Railroad Company; Stroud's Creek & Muddlety Railroad Company; Sturgis, Goshen, Saint Louis Railway Company; Stuttgart & Rice Belt Railroad Company, and G. N. Peay, Receiver; Sulphur Mining & Railroad Company; Summit Branch Mining Company's Railroad; Sumner Phosphate Company's Railroad; Suncook Valley Railroad Company; Superior & Southeastern Railway Company; Surray, Sussex & Southeastern Railway Company; Survey & Fort Myers Line; Susquehanna & Buffalo Railway; Susquehanna & Eagles Mere Railroad Company; Susquehanna River & Western Railroad Company; Suwanee River & White Sulphur Springs Railway Company; Swartz & Ouachita City Railroad Company; Sylacauga & Wetumpka Railroad; Syracuse & Baldwinsville Railway Company; Syracuse & Milford Railway Company; Takoma, Olympia & Chehalis Valley Railway Company; Tallahassee & Gulf Railroad Company; Tallahassee & Montgomery Railway Company; Tama & Toledo Electric Railway & Light Company; Tampa Bay Transportation Company; Tavares & Gulf Railroad Company; Tatum Lumber Company's Railroad; Tehauntepec National Railway Company; Tennessee Copper Company's Railroad; Tennessee River Navigation Company; T. W. Thayer Company's Railroad; Thomas & Sayreton Railroad; Thompson & Northern Railroad; Thompson Run Coal & Railroad Company; Three Lakes Lumber Company's Railroad; Ticonderoga Railroad Company; Tidewater & Western Railroad Company; Tidewater Power Company; Timpson & Henderson Railway Company; Tintic Range Railroad Company; Tioga & Southeastern Railroad Company; Tionesta Valley & Hickory Railway Company; Tipton Railroad Company; Tivoli a Hollow Railroad Company; Toledo & Chicago Railroad Company; Toledo & Rossford Railroad Company; Toledo Belt Railway Company; Toledo, Canada Southern & Detroit Railway Company; Toledo, Ottawa Beach & Northern Railway Company; Toledo Southeastern Railway Company; Toledo Terminal Railroad Company; Tomahawk & Eastern Railway Company; Tombstone & Southern Railroad Company; Tonawanda Island Bridge Company; Towles Steamboat Line; Transportation Railway; Trenton Transportation Company; Tresckow Railroad Company;

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Trexler & Turrell Lumber Company's Railroad; Trinity County Lumber Company's Railroad; Tri State Lumber Company's Railroad; Troy & Bennington Railroad Company; Troy & Greenbush Railroad Association; Tuckshoe & James River Railroad Company; Tuskegee Railroad Company; Twin Buttes Railroad; Twin City Belt Railway Company; Unicoi Railway; Union Depot & Railway Company (Denver, Colo.); Union Depot Bridge & Terminal Railroad Company; Union Depot Company (Columbus, Ohio); Union Freight Railroad Company; Union Pinepolis Saw Tram Road; Union Railroad Company of New York; Union Springs & Northern Railway Company;

Union Steamboat Line; Union Stock Yards & Transit Company; Union Terminal Railway Company (St. Louis, Mo.); Union Terminal Railroad Company (Sioux City, Iowa); Union Terminal Railroad Company (Buffalo, N. Y.); Union Town & Lickrun Railroad Company; Union Terminal Railroad Company; United New Jersey Railroad & Canal Company; United Steamship Company; United Verde & Pacific Railway Company; Union County Railroad Company; Utah Central Railroad Company; Utah Rail-
1538 way Company; Utica & Black River Railroad Company; Utica, Chenango & Susquehanna Valley Railway Company; Utica, Clinton & Binghamyton Railroad Company; Valley Connecting Railroad Company; Valley Railroad Company of New York; Valley River Railroad Company; Valley Street Railway Company; Valpariso & Northern Railway Company; Vancouver, Victoria & Eastern Railway & Navigation Company; Vanderbilt Timber, Mining & Southwestern Railway Company; Vermont & Massachusetts Railroad Company; Vermont & Providence Line Railroad Company; Vernon, Greensburg & Rushville Railroad Company; Versailles & Scottlia Railroad Company; Victoria & Sidney Railway Company; Victoria Electric Railroad Company; Vincentown Branch of the Burlington County Railroad Company; Vinegar Bend Lumber Company's Railroad; Vinton Lumber Company's Railroad; Virginia & Southwestern Railway Company; Virginia & Mt. Airy Railway Company; Virginia Air Line Railway Company; Virginia Anthracite Coal & Railway Company; Virginia, Carolina & Southern Railway Company; Virginia Midland Railway Company; Virginia Navigation Company; Virginia Ore & Lumber Company's Railroad; Virginia & Potts Creek Railroad Company; Waccamaw Railroad; Wainhurst Railroad; Wallace Tugboat & Transportation Company, Inc.; Walkersville & Ireland Railway Company; Walsenburg & Western Railway Company; Ware River Railroad Company; Warren & Saline River Railroad Company; Warren Railroad Company; Warrenton Railroad Company; Warrier Southern Railway Company; Washington & Choctaw Railway; Washington & Glen Echo Railroad Company; Washington & Great Falls Railway & Power Company; Washington & Rockville Railway Company; Washington Central Railway Company; Washington Electric Railway Company; Washington Interurban Railroad Company; Washington Railway & Elec-

tric Company; Wautauga & Yadkin Railroad Company and W. J. Grandis, Receiver; Wautauga Railroad Company; Frank Waterhouse & Company, Incorporated; Waukegan, Rockford & Elgin Traction Company and R. C. Peck, Receiver; Webber Falls Railroad Company; Wellsburg & State Line Railroad Company; Wellsville & Buffalo Railroad Corporation; Wenatches Valley & Northern Railway Company; West Clarion Railroad Company; Westerman Coal & Iron Railroad; Western & Pacific Railroad Company; Western Arizona Railway Company; Western Illinois Railway Company; Western Redwood Lumber Company's Railroad; Western Transit Company; Western Transportation Company; Western Washington Railroad Company; Westinghouse Inter Work Railway Company; Weston Lumber Company's Railroad; West Virginia & Southern Railroad Company; West Virginia Midland Railroad Company; West Virginia Short Line Railroad Company; Wharton & Northern Railroad Company; Wharton Valley Railway Company; Whitcomb & Morris Railway Company; Whitecastle & Lake Natchez Railroad; White Deer & Loganton Railway Company; White Deer Valley Railroad Company; White Oak Railway Company; Whites Creek Lumber Company's Railroad; White Sulphur Springs & Yellowstone Park Railway Company; White Top Railway Company; Whiteville Lumber Company's Railroad; Whitney Transportation Company; Whitney Company's Railroad; Wheatland Street Railway Company; Wichita Falls Railway Company; Wilcox & Philips Boat Line; Wilcox Railroad; Wilkes-Barre & Scranton Railway Company; Wilkes-Barre Terminal Railroad Company; Williston & Jackson Belt Railway Company; Wilton & Northern Rail-
1539 road; Wilton Railroad Company; Winfield, Texas & Gulf Railway Company; Winifreds Railroad Company; Winnsboro Granite Corporation's Railroad; Winona & Western Railroad; Wiscassett, Waterville & Farmington Railway Company; Wisconsin, Minnesota & Pacific Railroad Company; Withlacoochee Transportation Company; Woodward Iron Company's Railroad; Wood River Branch Railroad Company; Woodridge Jellico Coal Company's Railroad; Worcester Consolidated Street Car Company; Worcester, Nashua & Rochester Railroad Company; Wyndotte & Southeastern Railway Company; Wyatt & Donavon Railroad; Wyoming & Pond Creek Railroad; Yankton & Western Railway Company; Yellowstone Park Railway Company; Yellowstone Park Railroad Company (Idaho); Yellowstone Park Railroad Company (of Montana); Yellowstone Park Railway; York, Hanover & Freslerick Railroad Company; Yosemite Short Line Railway Company; Youghiogheny & Wick Haven Railroad Company; Youngstown & Austintown Railroad Company; Youngstown & Sharon Street Railway Company; Youngstown & Southern Railway Company; Youngstown Sheet & Tube Company's Railroad; Zanesville Belt Terminal Railway Company; Zanesville Terminal Railroad Company; Zimmerman, Leesville & Southwestern Railway Company; Zuni Mountain Railroad; Alabama-Tennessee & Northern Railway; Albemarle Steam Naviga-

tion Company; Arkansas Railroad Company; Buffalo, Bradford & Kane Railroad Company; Caro Northern Railway Company; Carolina & Northeastern Railroad Company; Chicago & Detroit Steamship Lines; Ft. Smith, Poteau & Western Railroad Company; Galesburg & Western Railroad Company; The Grand Rapids, Holland & Chicago Railway Company; Kane Railroad Company; Keating & Smethport Railroad Company; Kushequa Railroad Company; Lawrenceville Branch Railroad Company; Louisville Bridge & Terminal Railway Company; Manila & Southwestern Railroad Company; Marcellus & Otisco Lake Railway; Meade Run Railroad Company; Middle Tennessee Railroad; Pharr & Chotin Barge Service; Richmond-New York Steamship Company; The Shore Line Electric Railway Company and R. W. Perkins, Temporary Receiver; Smethport Railroad Company; Southern Utah Railroad Company; Wolvin Line; Quincy Railroad Company; respondents.

It appearing, that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rule or regulation as might appear to be necessary;

It further appearing, that said order dated March 22, 1921, was served in the manner provided by law upon all carriers by railroad in the United States subject to the interstate commerce act, said carriers being listed above and hereinafter referred *as* as respondents;

It further appearing, that a full investigation of the matters and things involved has been had with respect to carriers serving bituminous-coal mines, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

1540 And it further appearing, That no reason appears for the continuance of the investigation as to carriers serving solely anthracite-coal mines:

It is ordered, That each of the respondents be, and each is hereby, notified and required to cease and desist, on or before September 1, 1923, and thereafter to abstain, from maintaining and enforcing, in so far as such respondent maintains and enforces, a regulation or practice whereby in the distribution of cars for the transportation of coal among the bituminous-coal mines served by such respondent, whether located upon its line or customarily dependent upon it for car supply, private cars or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars.

It is further ordered, That each of the respondents which distributes cars to bituminous coal mines located upon its line or cus-

tomarily dependent upon it for car supply be, and each is hereby, notified and required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

It is further ordered, That the present investigation, so far as it in terms covers the distribution of cars at anthracite mines, be, and it is hereby, discontinued.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

1541 Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the commission filed and entered December 23, 1924, in case No. 12530, In Re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel, the original of which is now on file and of record in the office of this commission.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 20th day of May, A. D. 1925.

[SEAL.] GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

1542 Interstate Commerce Commission

Assigned Cars for Bituminous Coal Mines. No. 12530. In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

Submitted December 19, 1923. Decided December 23, 1924

1. Paragraph (12) of section 1 of the interstate commerce act held to apply to cars placed at carrier-owned and output-contract mines and can not be relied upon to show that the Congress exempted such cars from the other provisions of section 1 requiring reasonable rules

of distribution, and the provisions of section 3 prohibiting unduly preferential or prejudicial rules.

2. Findings in former report, 80 I. C. C. 520, that the practice of respondents in assigning private cars, and system or foreign-line cars for railway fuel, to bituminous-coal mines in excess of the ratable share contemporaneously distributed to bituminous-coal mines upon their lines which do not receive assigned cars, found for the future to be unjust and unreasonable, and unjustly discriminatory against, and unduly prejudicial to mines not receiving assigned cars, and unduly and unreasonably preferential of mines which are furnished such cars in excess of the ratable proportion, and that cars specially placed by order of the commission under the provisions of paragraph (15) of section 1 of the act may properly be treated as assigned cars and need not be taken into account in determining the ratable distribution when the order of placement so requires, affirmed.

3. Order entered in this proceeding June 13, 1923, the effective date of which has been postponed until January 15, 1925, permitted to become effective on March 1, 1925.

Henry Wolfe Biklé, W. S. Bronson, Kenneth F. Burgess, H. T. Dick, O. W. Dynes, R. V. Fletcher, F. W. Gwathmey, Walter McFarland, W. A. Northcutt, C. C. Paulding, H. R. Preston, Theodore W. Reath, C. J. Rixey, C. M. Sheafe, jr., and H. A. Taylor for respondents, members of the American Railway Association; J. H. Fishback for Canadian National Railways; Joseph H. Nuelle for New York, Ontario & Western Railway Company; and Eugene S. Williams for Western Maryland Railway Company, respondents.

August G. Guthelm and James W. Carmalt for Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahontas Consolidated Coal Company, Pennsylvania Coal & Coke Corporation, Pittsburgh Plate Glass Company, Public Service
1543 Electric Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company, Donner Union Coke Corporation, Rainey-Wood Coke Company, and Island Creek Coal Company; Hugh F. Smith, F. C. Slee, and Ralph J. Baker for Seaboard By-Product Coke Company, Chicago By-Product Coke Company, Donner-Union Coke Company, and Rainey-Wood Coke Company; Wayne Johnson for Pennsylvania Coal & Coke Corporation; Richard Jones, jr., for Republic Iron & Steel Company; L. A. Manchester for Youngstown Sheet & Tube Company; Paul D. Cravath, Hoyt A. Moore, and Frederick L. Ballard for Bethlehem Steel Corporation and subsidiaries; Richard V. Lindabury, Charles McVeagh, and Charles S. Belsterling for Illinois Steel Company, Carnegie Steel Company, American Steel & Wire Company, National Tube Company, American Sheet & Tin Plate Company, United States Coal & Coke Company, United States Fuel Company, and H. C. Frick Coke Company; Clifford H. Browder for International Harvester Company and Wisconsin Steel Company; Horace Andrews, W. P. Belden, and John B. Putnam for Cleveland Cliffs Iron

Company, Steel Company of Canada, Limited, Perry Iron Company, and Pickands, Mather & Company; C. B. Longley for Ford Motor Company; and E. T. Butler for Trumbull Steel Company and Trumbull Coal Company.

Russell B. Burnside and Charles G. Blakeslee for Public Service Commission of New York.

Shearman & Sterling, Samuel E. Wolf, William C. Speer, James L. Quackenbush, M. S. Sloan, J. C. Edwards, and W. L. Pepperman for various public utilities.

Butler, Lamb, Foster & Pope and Ernest S. Ballard for National Coal Association; A. M. Liveright for Central Pennsylvania Coal Producers' Association; R. W. Ropiequet for Illinois Coal Traffic Bureau; L. C. Boyle and George N. Brown for Southern Ohio Coal Exchange; C. D. Boyd for Harlan County Coal Operators' Association and Hazard Coal Operators' Exchange; E. L. Greever and Greever & Gillespie for Pocahontas Operators' Association and Operators Association of Williamson Field, W. Va.; S. C. Higgins for New River Coal Operators' Association; A. R. Yarborough for Kanawha Coal Operators' Association; C. J. Neekamp for Northeast Kentucky Coal Association; E. J. McVann for Northern West Virginia Coal Operators' Association; W. L. Hammond for White Star Coal Company and Detroit City Gas Company; and Van A. Bittner and W. Jett Lauck for International Union, United Mine Workers of America.

1544 REPORT OF THE COMMISSION ON FURTHER HEARING

AITCHISON, Commissioner:

This case is before us on further hearing. On March 22, 1921, we instituted an investigation upon our own motion, with respect to the reasonableness and propriety of the present car distribution rules of the respondents, i. e., all the steam-railroad carriers subject to our jurisdiction, in so far as such rules apply to privately owned coal cars and cars furnished for railroad fuel coal, with a view to prescribing such just or reasonable rules or regulations as might appear to be necessary.

On June 13, 1923, after extended hearings and argument, we issued our report, 80 I. C. C. 520, in this proceeding. The rule as proposed by respondents at the hearings provided in substance that assigned cars, namely, cars for railway fuel and private cars, must be placed at the coal mines to which assigned; that if the assigned cars thus placed at a mine should equal or exceed the mine's pro rata share of the available car supply for that day it should not be entitled to any unassigned cars; but that if the number of assigned cars placed at the mine should be less than its pro rata share for that day it should be given enough unassigned cars in addition to its assigned cars to make up its pro rata share. This rule and the classes of cars it covers are more particularly described in our report,

pages 522 et seq. We there held that the rules proposed by the respondents do not in terms contravene paragraph (12) of section 1 of the act, and found: "that in the distribution of cars for transportation of coal among the bituminous-coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be
1545 counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall preclude the commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

"There appears to be no reason for the continuance of the investigation as to carriers serving solely anthracite coal mines, and the present investigation, as far as it in terms covers the distribution of cars at anthracite mines, will be discontinued."

By an order issued at the time of our report, June 13, 1923, we required the respondents, on or before September 1, 1923, to discontinue the regulation and practice found to be unreasonable and unjustly discriminatory in the report and thereafter to establish rules and practices in conformity with our finding. We thus required the carriers to abolish the assigned-car rule.

Soon after our report was issued, and before the effective date of our order, petitions for rehearing were filed by the respondents and

by a number of owners and users of private cars. The case was reopened upon the petitions filed herein, a hearing was held, briefs were filed, and the case was orally argued. It is now before us upon the voluminous record made in the original hearing and on the further hearing. Pending the disposition of this case we have from time to time postponed the effective date of our original order. On the further hearing, as in the original hearing, the evidence related to distribution of cars to bituminous mines as distinguished from anthracite mines and our present determination will be so limited.

We shall first deal with assigned cars for railway fuel, and then with assigned private cars.

Assigned cars for railway fuel

In the original proceeding respondents contended that on any particular day a carrier should be permitted to assign cars to a mine for railway fuel in excess of the mine's pro rata share of cars even though on the following day the mine should ship commercial coal. The carriers now take the position, however, that without conceding the day-to-day assignment of cars to be unlawful, they can get along if permitted to assign cars to mines the entire output of which they take for a substantial period. They now contend only for a rule which will permit the unrestricted placement of cars under the assigned-car rule to such mines. Respondents in argument assume the period to be at least six months or a year.

1546 The principal contentions of the carriers are (1) that we are without authority under the interstate commerce act to abolish the assigned-car rule as applied to cars placed at mines owned by a railroad and furnishing it their entire output for an extended period, six months or more, and to mines from which a carrier purchases the entire output for a like period, and (2) that if we have such authority, the record shows that the rule is reasonable and not unjustly discriminatory.

Situations of individual carriers summarized.—In their petitions for rehearing respondents asked that the case be reopened and evidence heard for the purpose of ascertaining whether the experience of the carriers shown in the table on page 536 of our original report as not using assigned cars, is such as to justify the abolition of the assigned-car rule. On further hearing witnesses representing eight of the 52 carriers listed in this table testified as to the individual situations on their respective lines. We summarize the showing as to the eight as follows:

The Great Northern has not found it necessary to follow the assigned-car practice in securing its coal. Our table is correct in showing that it was not assigning cars in 1920 and on October 1, 1922. For periods of a few days at times the carrier insists that its fuel coal be loaded by the mines in preference to commercial coal. About 53 per cent of the fuel which the Great Northern uses is obtained from the docks at the head of the lakes and is consumed on its lines

east of Wolfe Point, Mont. Box cars are used to a considerable extent for this movement. The remainder of its fuel is obtained from Montana mines, the largest one of which it owns, and from a mine at Bernie, British Columbia. About 94 per cent of the coal produced west of Wolfe Point is used for company fuel. Part of this comes from small mines with which the carrier has made partial-output contracts to enable them to continue in operation. During the coal strikes of 1919 and 1922 some coal was received by the Great Northern from mines in Illinois. From September, 1922, to April, 1923, between 11,000 and 12,000 cars of coal were received from this source. About 11 per cent of this coal came in cars which this carrier delivered to the Chicago, Burlington & Quincy to be placed at a mine at Herrin, Ill., with which the Great Northern had a contract for the entire output. The witness produced by this company was not informed as to whether the cars which were thus delivered were placed in excess of the mine's distributive share.

The Chicago & North Western originates on its line from 200 to 400 cars of fuel per day for its own use, and from 20 to 200 cars of commercial coal. On an average 30 per cent is commercial
1547 and 70 per cent fuel coal. The greater portion of the company's fuel comes from its own mine in McCoupin County in central Illinois. A part of its supply comes from mines which it owns near Buxton, Iowa, and from other mines located in that State and in Wyoming. This company does not follow the assigned-car practice in obtaining its coal. This was true in 1920 and in October, 1922, as shown in the table in our report.

The St. Louis-San Francisco has not followed the assigned-car practice in obtaining fuel coal from mines on its own line. In case of car shortage the mines give the railroad preference in filling orders for coal. About 20 per cent of its fuel supply is obtained under partial-output contracts from mines off its line, located on short lines in Illinois near St. Louis, except a mine located on the Louisville & Nashville, the output of which is taken jointly by the Louis-San Francisco. If these mines are given more than their per-lines furnish a full car supply, if needed at the mine on the Louisville & Nashville, without reference to the existing car supply on that road. Cars are also furnished for loading at the other off-line mines, but the witness called by this carrier was not informed as to whether such cars were placed in excess of the mines' distributive share. The Seaboard Air Line furnishes cars for its coal at mines on the St. Louis-San Francisco. If these mines are given more than their percentage allotment, the excess is equalized as promptly as possible. Of the St. Louis-San Francisco's fuel requirements 25 per cent is cared for by oil. Except in times of anticipated mine suspension this company does not store coal.

The Atchison, Topeka & Santa Fe followed the assigned-car practice in 1920 and was following it on October 1, 1922, in the placement of stock and ballast cars at mines on its line. The company

owns 6,000 hopper-bottom stock cars and 2,500 drop-bottom ballast cars. These, the witness for the company testified, are not acceptable to commercial coal loaders, but it is shown that they are loaded at mines which also ship commercial coal and can be dumped in the same manner as ordinary coal cars. They are used exclusively in times of car shortage for company fuel, and are counted against the mines under the assigned-car rule. At other times ordinary gondolas are used for this purpose. This company consumes about 140 cars of coal a day, 90 per cent of which is secured from mines on its own line, including its own mines. In times of car shortage about two-thirds of the fuel coal from mines on its line moves in the stock and ballast cars, the remainder in other cars distributed on a pro rata basis. Coal from off-line points is secured from a mine on the Burlinton and from one on the Minneapolis & St. Louis. The latter furnishes about four cars a day in Atchison, Topeka & Santa
1548 Fe cars. The witness was not informed as to whether these cars are placed at the mine in excess of the commercial ratable distribution. About 60 per cent of the company's total fuel requirements is met by the use of oil.

The Carolina, Clinchfield & Ohio is shown in our original report as assigning cars for its fuel purposes in 1920, and as not following this practice on October 1, 1922. However, the record on further hearing shows that in 1920 this company did not find it necessary to resort to the assigned-car practice. During the almost continuous car shortage that year, when the supply ran as low as 50 per cent for extended periods, the company was able to secure preferential loading of its coal at the mines with which it contracted. In other words, the mine operator deferred the filling of commercial orders until the railroad's fuel needs were met. Beginning in November, 1922, the carrier began to assign cars, as it was unable to get its contracts filled during the car shortage then existing, and because the coal company with which it contracted for fuel refused to fill its orders in preference to commercial customers. It assigned the cars to a mine the output of which was taken jointly by it and the Southern. It consumes coal at the rate of about 20 cars per day. It has on its lines 25 mines, producing 350 cars of coal per day, which represents 65 per cent of the total tonnage handled. It owns sufficient cars to care ordinarily for the output of the mines on its line. These cars normally move to southeastern territory and come back regularly. During 1922, however, owing to the coal miners' strike, many of its cars were diverted from their usual channels and moved to western territory. This resulted in a considerable shortage. No coal is stored by this company.

The Western Maryland obtains its coal under yearly contracts from four or five mines having a total capacity of about 50 cars per day. These mines are located on its line or on lines over which it has trackage rights. They produce no commercial coal. This carrier follows the assigned-car practice when it considers this nec-

essary. In October, 1922, it was not securing its fuel coal in assigned cars but did so in 1920. A car shortage developed the first week in November, 1922, and lasted until April, 1923. During this period assigned cars were used to cover the fuel needs of this carrier.

Subsequent to our former hearings in November, 1922, the Seaboard Air Line arranged with the St. Louis-San Francisco, Louisville & Nashville, and Birmingham Belt to assign cars for its fuel supply to mines on those roads in the Alabama field. Cars were furnished by the Seaboard under this arrangement. The witness produced by this carrier had no information as to whether the roads to which such cars were delivered placed the cars in excess of
1549 the pro rata share of such mines, but stated that since the cars have been furnished by his road to mines on lines of these carriers, an adequate and dependable supply of the proper grade of coal has been secured.

The table in our report is correct in showing that the Delaware, Lackawanna & Western did follow the assigned-car practice in 1920 and was not following this practice on October 1, 1922. On the latter date it had a surplus of about 1,700 cars of bituminous coal on line, which, following the coal miners' strike, had been secured principally from England and in part from Nova Scotia and Virginia. This surplus was greatly reduced toward the latter part of 1922, and the carrier then resumed the assigned-car practice. It regarded this as the only practicable means of securing its coal during the car shortage then existing. This carrier's fuel supply of about 100 cars a day is secured from mines on foreign lines in Ohio and Pennsylvania. About 60 per cent of its supply is secured from output-contract mines on the assigned-car basis and 40 per cent from partial-output mines without assigned cars.

In our report, page 541, we pointed out that certain important carriers, including the Pennsylvania, New York Central, and Louisville & Nashville, had not presented any statement of the reasons which impelled them to adopt or maintain the assigned-car practice. In their petition for rehearing respondents referred to this statement, and asserted that if we considered the record deficient in this respect, their petition should be granted in order that information might be supplied as to the practice and experience of these railroads. On the further hearing the New York Central and its affiliated company, the Michigan Central, introduced evidence as to the individual situations on their lines. The Pennsylvania and the Louisville & Nashville offered no testimony, but announced that they would rely upon the evidence introduced by respondents in the original hearing. Certain other carriers not shown in the table in our report introduced evidence on further hearing. The individual situations shown will be briefly reviewed.

The New York Central Railroad consumes normally 8,000,000 tons of coal per year, 74 per cent of which is obtained under contracts which call for the total output of the mines for a year, and cover the

carrier's minimum requirement of 450 cars per day. These mines are on the assigned-car basis. Among these mines are nine owned by the carrier through a subsidiary company, the Clearfield Coal Corporation. The company mines supply the carrier with about 120 cars of coal a day at a price 7 cents per ton less than that paid to other operators in the same district. Different kinds of coal are used on various divisions of the carrier, and the engines are drafted
1550 accordingly. The carrier claims that in time of sustained car shortage it is necessary to use assigned cars to insure delivery of the proper quality of coal. During the winter the carrier's daily consumption of coal reaches a maximum of 600 cars, and the additional coal is purchased from partial-output mines and obtained without assigned cars. In October, 1923, this carrier had in storage 750,000 tons of coal or about 43.5 days' supply. It customarily carries from six to eight days' supply in cars, some of which is hauled 500 to 600 miles. The witness for this carrier stated that if not permitted to assign cars in case of a sustained car shortage, it would be necessary to increase the supply in cars to from 10 to 12 days, thereby tying up approximately 2,500 additional cars for fuel.

The Michigan Central secures about 24 cars per day of its fuel requirements of 140 cars from mines on its line in Michigan. It has two contracts for the total output of mines on foreign lines. Other contracts are made jointly with other subsidiary lines of the New York Central. Its fuel supply in Michigan, as well as at other mines from which it takes a partial output, are secured without the use of assigned cars. Before placing contracts, invitations to bid are sent to between 200 and 300 operators. Contracts are made for the coal year. Under the assigned-car rule, this carrier is able to secure coal from approved mines which guarantee a regular source of supply. From 1912 to 1917 it secured its entire supply without the use of assigned cars. The carrier contends that without assigned cars it would be unsafe to carry less than 10 days' supply under load, while with the assigned car about six days' supply is kept under load.

The Erie Railroad consumes approximately 3,800,000 tons of bituminous coal a year. Approximately 54 per cent is from mines on foreign railroads, and the remainder comes from mines on its own line. Among the latter are 10 mines operated by two companies, the stock of which is owned by the carrier. These 10 mines furnish approximately 40 per cent of the carrier's total fuel supply, and also ship small quantities commercially. Only a small percentage of the coal produced on the line is commercial coal. This carrier purchases its coal under contracts providing for delivery of a maximum and minimum tonnage, the minimum being 20 per cent less than the maximum. The carrier obligates itself to take the minimum, but may take the maximum. In securing its coal the carrier follows the assigned-car practice. A large amount of its coal originates on the Pittsburg & Shawmut and is obtained through brokers. The Erie delivers its cars to that carrier for use by the brokers who designate the mines at which the cars are to be placed

on the assigned-car basis. At the time of the hearing in
1551 October, 1923, this carrier had stored about 60 days' supply of coal on the ground.

The Hocking Valley consumes normally about 25 cars of coal a day, which it secures from three of the 150 to 200 bituminous mines which it serves. One of the three mines furnishes its entire output to the carrier, the other two only part of their output. In making contracts for the output of mines the period provided is not less than six months. The assigned-car practice is followed as to output mines, but not as to partial-output mines. The carrier owns 350 side-dump cars, which are classed by it as work cars, and used exclusively in securing its fuel coal. These cars, with others of the same kind, were formerly used in commercial service. The others, however, were converted in 1918 into solid-bottom cars to make them more suitable for commercial use. The carrier's coaling stations have been constructed for the use of side-dump cars, and are not suitable for the use of cars of other types. The 350 side-dump work cars are used at both the total-output mines and the partial-output mines. However, they are not placed in excess of the distributive share of the partial-output mines. From 60 to 70 cars of locomotive fuel are ordinarily carried at the fuel stations each day. About 50,000 tons of coal were stored on the ground between February and July of 1923. Some of this coal had to be removed because of spontaneous combustion.

The Chicago, Rock Island & Pacific system consumes about 3,500,000 tons of coal per year. About 40 per cent of this coal is secured from 15 of the 72 mines on its line. The remaining 60 per cent is secured from mines in Illinois on the Chicago & Alton, the Chicago, Illinois & Midland, and the Louisville & Nashville; from mines in Colorado on the Colorado & Southern and Denver & Rio Grande, and from mines in New Mexico on the El Paso & Southwestern. This coal is used as nearly as possible to point of production. The carrier sends cars under special assignment to the mines on foreign lines, except to those in Colorado and New Mexico, where 50 per cent of the car requirements are furnished. This, however, is under an agreement between the railroads, and includes cars for commercial loading as well as cars for railroad fuel. The carrier follows the assigned-car practice as to mines on its own line, including four or five mines it owns in Oklahoma, which supply about 5 per cent of its fuel coal. They also engage in commercial business. This is true of other mines on its line furnishing it with coal. The witness produced by this company was not informed as to whether cars were placed for its fuel loading at mines on foreign lines in excess of their pro rata share of cars.

1552 In our former report, at page 541, we described briefly the practices of the Chicago, Burlington & Quincy with respect to its fuel supply. The capacity of the mine which it owns in southern Illinois has since been increased from between 4,200 and 4,500 tons to between 5,500 and 6,000 tons per day, and is expected ultimately

to reach a capacity of 7,000 tons per day. From January to July, 1923, the lowest price which the carrier paid for coal from mines other than its own mine was $2.86 per ton in May, and the highest was $3.19 per ton in January. The prices thus paid were approximately 40 cents per ton higher than the cost of coal from its own mine. This mine is owned through a subsidiary company. The authorities of Illinois authorized such ownership as in the public interest provided that the price paid by the carrier for the coal purchased from the coal company should not exceed the cost of production plus interest charges and depreciation and provided that no coal should be supplied to the general commercial trade. The company assigns cars only to its own mine and to a mine whose output is taken by another carrier in cars furnished by the latter. About 7,000 of the 13,500 tons which the Chicago, Burlington & Quincy consumes daily is procured without assigned cars from mines the partial output of which it takes. During slack periods, or when requirements are less, its own mine is closed down because the contract mines meet its requirements. This carrier stores coal, but has found it impracticable to store fine coal. On October 1, 1923, 648,685 tons of coal were in storage at 20 different points. On lines east of the Missouri River the carrier operates 121 self-firing locomotives, which burn fine coal. This kind of coal is most satisfactory from the standpoint of price and helps commercial mines to dispose of a grade for which there is frequently no market. In a number of instances the carrier obtained coal from mines other than its own to improve conditions and realize more freight revenue.

In our original report, page 537, we stated that the Chicago Great Western owned a mine on the Illinois Central and had provided itself with hopper-bottom cars, which were assigned to the mine to take care of its fuel needs. The controlling interest in this mine was acquired in 1917. The Madison Coal Corporation, a subsidiary of the Illinois Central, operates the mine and furnishes the entire output to the Chicago Great Western for fuel. About 80 per cent of the carrier's daily consumption of 2,500 tons is obtained in the hopper-bottom cars from this mine on the assigned-car basis. The carrier has 21 modern mechanical coaling stations on its line, for which these cars are especially adapted and at which they can be
1553 unloaded at a cost about 14 cents per ton less than the cost of unloading from miscellaneous equipment.

The practices of the Chesapeake & Ohio were explained in our report at page 540. Since the original hearing it has reduced the number of cars daily under load with fuel from 1,200 to 700, or approximately 1,300 loaded and empty cars out of an ownership of 40,000 coal cars. This was accomplished by discontinuing the practice of concentrating fuel coal at division points, from which it was rehandled. It now moves direct to the consuming point. The locomotives of the carrier are designed to use nut and slack coal largely. This represents approximately one-third of a mine's output, lump and egg representing the remainder. The witness produced by this

carrier expressed the opinion that preferential contracts calling for nut and slack are not practicable, since lump and egg coal must be produced and shipped at the same time; and that it would not be practicable to supply the kind of coal in the type of car suited for unloading at the various coaling stations if pro rata distribution should be required. During the first six months of 1923, when a car shortage existed, 25,148 cars were supplied for company fuel. The witness testified that if these cars had been distributed with other cars on a pro rata basis the car supply at commercial mines would have been increased 2.2 per cent. From July to September the increase, it was testified, would have been 1 per cent. This carrier will not receive assigned cars from a foreign line unless they are delivered in cuts of 15 cars or more and are for placement at a mine or mines having output contracts with the foreign line for a period of not less than six months. On October 1, 1922, the Atlantic Coast Line, the Richmond, Fredericksburg & Potomac, and the Detroit & Mackinac had contracts for fuel supply with mines on this carrier's rails, but cars were not assigned to any of these mines until the latter part of the year, because of the condition of the motive power of the Chesapeake & Ohio. Since that time cars have been assigned for the Atlantic Coast Line and the Detroit & Mackinac, but not for the Richmond, Fredericksburg & Potomac, because that carrier has been unable to meet the requirements of the Chesapeake & Ohio.

The Canadian National, which includes the Grand Trunk, referred to at page 540 of our report, obtains from 35 to 40 per cent of the 8,500,000 tons of coal it consumes per year from mines in the United States. About 20 per cent of the entire supply is from two mines which it owns in Ohio, one on the Pennsylvania and the other on the Baltimore & Ohio. Both are on the assigned-car basis. The cars are furnished by the Canadian National. These mines were selected because of the quality of coal produced. The carrier
1554 obtains approximately 1,000,000 tons of fuel coal per annum in this country, without assigned cars, from various mines from which it purchases part of the output. The assigned-car practice is not followed in securing coal in Canada. The carrier attempts to keep from 60 to 100 days' supply of coal on hand, with a larger supply at the Lake ports, in order to provide for the entire winter. At the time of the last hearing it had from 90 to 100 days' supply at all points.

The Associated Industries of Massachusetts, with a membership of about 1,557 manufacturing industries, appeared in support of the assigned-car rule, and urged that it be left in effect to enable the New England carriers to secure a regular and dependable supply of coal.

On the further hearing, the assigned-car rule was opposed by the International Union, United Mine Workers of America, and by various coal operators' associations, including the National Coal Association, the Central Pennsylvania Coal Producers' Association,

Southern Ohio Coal Exchange, Pocahontas Operators' Association, and the Illinois Coal Traffic Bureau. Generally speaking, the opponents of the rule contend that the evidence introduced on further hearing is merely cumulative and that no showing has been made which would warrant us in reversing our decision in the original case.

Evidence was introduced by some of the opponents of the assigned-car rule to show the discriminatory effect of this rule, the resulting diminution in the percentage allotment at nonassigned-car mines, and the practicability of securing railway fuel of proper quality at reasonable prices without assigning cars under the rule. The National Coal Association introduced in evidence, among other things, a table showing new equipment acquired, condition of old equipment, and railroad-fuel coal stored by railroads of this country, following an efficiency program which was adopted by railroad executives on April 5, 1923, to enable the carriers better to meet the transportation demands of the country. This table showed railway coal stored on November 1, 1921, to be 11,701,736 tons, on October 1, 1922, 5,423,195 tons, and on October 1, 1923, 17,663,448 tons. This association also introduced evidence showing tonnage of coal moved by representative noncoal-loading carriers, coal cars owned by each, and percentage of cars owned on line, by months, for the years 1920, 1921, and 1922, the percentage being substantially more than 100 per cent during the car-shortage periods of 1920 and the last half of 1922. The witness for the International Union, United Mine Workers, testified as to the irregularity in working time of miners in various sections of the country during the year 1921, and asserted that, although that was a year of full car supply, the
1555 irregularity in working time resulted largely from overdevelopment of the mining industry caused by the assigned car in the past. In addition to testifying as to the adverse effect of the assigned-car rule upon labor, this witness also testified that the use of the assigned car enables the railroad to obtain cheaper fuel at the expense of the public, because with short car supply at other mines the cost of production is increased, and this increased cost is passed on to the public.

Contention as to our authority: Our authority over the distribution of cars of carriers subject to the act is to be found in sections 1, 3, and 15. Section 1 requires rules of car distribution to be reasonable, section 3 prohibits them from being unduly preferential or prejudicial, and sections 1 and 15 authorize us to prescribe just and reasonable rules. The provisions of these sections clearly indicate the broad scope of the authority which Congress has conferred upon us, and the important duties with which we are charged, to require, in time of car shortage, a just and equal distribution of cars and the prevention of a distribution which is unjust and discriminatory. **United States v. New River Co., 265 U. S. 533.**

Respondents, however, contend that paragraph (12) of section 1 shows that we have no jurisdiction over the distribution of cars to

carrier-owned or output-contract mines which furnish railway fuel exclusively for at least six months, because such mines are not "served" by a carrier and coal is not "transported" therefrom. The first sentence of this paragraph is relied upon to support this contention. This sentence reads:

"It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply."

The word "served" has no judicially determined or technical meaning which would make it inapplicable to carrier-owned or output-contract mines. We must, therefore, give this word its ordinary meaning. The Standard Dictionary defines it, among other things, to mean "to furnish or provide as with a regular supply at stated periods." "Self-service" is a common expression. To use this word, therefore, to mean the furnishing of cars by a carrier at its own mines or at those the output of which it takes, is to give the word its ordinary and well-accepted meaning. This is the meaning which we believe the Congress intended. As used in paragraph (12) "served" is a convenient term to show that the provisions of this paragraph apply not only to mines which are located on a carrier's own line, regardless of the ownership or contractual arrange-
1556 ments of such mines, but also to mines which are located off its line and which it customarily supplies with cars.

Respondents also contend that the word "transportation" in paragraph (12) means common-carrier transportation, transportation for compensation, and not transportation of a carrier's own coal over its own line for its own consumption. They cite as authority Int. Com. Comm. v. Balt. & Ohio R. R., 225 U. S. 326; Santa Fe Ry. v. Grant Bros., 228 U. S. 177; and The Pipe Line Cases, 234 U. S. 548.

That "transportation" has not the restricted meaning claimed appears from the use of this word in the second sentence of paragraph (12), which reads:

"* * * During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. * * *"

The counting requirements clearly apply to cars placed by a carrier for its coal at mines on the same date shipping commercial coal, yet this coal is transported by the carrier without compensation. The word "transportation," therefore, as used in paragraph (12) is not limited in its meaning to transportation for compensation, but includes also transportation of the carrier's own coal over its line.

In Interstate Commerce Commission v. Ill. Cent. R. R., 215 U. S. 452, 472, the Supreme Court sustained the rule which we laid down in the Traer case, 13 I. C. C. 451, that cars for railway fuel should

be counted at the mines at which they are placed. The contention[1] there, as stated by the Supreme Court, was:

"When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce."

1557 The Supreme Court in overruling this contention said, at page 474:

"It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one."

Thus the court held that we had jurisdiction over cars used for hauling railway fuel over a carrier's own line, on the theory that such cars were instrumentalities of interstate commerce and could be regulated with a view to bringing about a just and equal distribution and preventing an unjust and discriminatory one. Whether the cars were used in common-carrier transportation was immaterial. The cases relied upon by respondents, namely, the B. & O. case, the Grant Bros. case, and The Pipe Line cases, supra, relate to what is common carriage and are, therefore, not in point. As to foreign-line fuel cars, we call attention to the following in our original report, p. 546:

"When a railroad company becomes a purchaser of coal upon the lines of a connection, and ships it to itself as consignee, it is entitled to the same consideration as any commercial shipper or consignee and no more, and this is true when the shipment moves partly over the rails of the carrier that is in fact the shipper or consignee. Rates on Railroad Fuel and Other Coal, 36 I. C. C. 1, 9, Divisions of Joint Rates on Railway Fuel Coal, 37 I. C. C. 265."

See also Interstate Commerce Commission v. B. & O. R. R. Co., 225 U. S. 326.

In view of the conclusion which we have reached as to the meaning of the words "served" and "transportation" in paragraph (12), we are of the opinion that its provisions apply to cars placed at carrier-owned and output-contract mines and can not be relied upon to show that the Congress exempted such cars from the other

[1] The lower court sustained this contention and in doing so said in C. & A. v. I. C. C., 173 Fed. 930, 932:

"Coal is brought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

"Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel."

provisions of section 1 requiring reasonable rules of distribution, and the provisions of section 3 prohibiting unduly preferential or prejudicial rules. On oral argument counsel for respondents expressed the opinion that we could restrict the assigned-car practice to mines furnishing their output to a carrier for periods of at least six months. They thus apparently admit that mines selling their output to railroads for shorter periods are "served" and the coal hauled in the assigned cars is "transported" within the meaning of the act.

Respondents contend that an assigned-car mine furnishing all of its coal to a railroad for a long period of time is not in competition during such period with unassigned-car mines selling coal to others, and that in the absence of competition we have no authority to make a finding of undue prejudice or unjust discrimination under
1558 section 3 of the act. The period which respondents assume, as we previously pointed out, is at least six months. If the period be less, apparently they recognize that competition may exist.

In the Illinois Central case, our authority under section 3 was in issue, and the court sustained our finding of unjust discrimination. Cars were required to be counted, although the coal in them belonged to the carrier and was transported by it without compensation for its own use. While respondents attempt to distinguish that case on the ground that, as they contend, only partial-output mines furnishing railway fuel were there dealt with, the principle there established is broad enough to cover this case.

Assigned-car mines which furnish their output for long periods of time to railroads are, at the end of such periods, because of lower costs and better labor conditions which they have enjoyed, in a position to undersell competing unassigned-car mines. The record also shows that railroad-owned mines in many instances sell coal commercially. Such mines may not only at any time dispose of part or all of their product commercially, but may be leased or sold to outside interests, and thus actively engage in selling commercial coal. Moreover, while we do not consider this circumstance essential to our decision in this case, the record clearly shows that there is competition in labor between railroad-owned and output-contract mines on the one hand and commercial mines on the other. We think upon the facts shown of record that we have jurisdiction to deal with the distribution of cars to all of such mines under section 3 of the act. Competition is not an essential element under section 1. Penn Tobacco Co. v. Old Dominion S. S. Co., 18 I. C. C. 197, 200.

Respondents contend that the evidence fails to show that the assigned-car rule is unreasonable under section 1 of the act; that a finding, if any, abolishing the assigned-car practice must rest on section 3; that the Traer case decision was made under that section; and that there has been no showing in this proceeding that justifies us in abolishing the rule laid down in that case.

In making this contention respondents, we believe, overlook the broad provisions of section 1 as to reasonable rules. Moreover, they fail to realize that to abolish the assigned-car rule is not to depart

from the principle laid down in the Traer case, but to carry out that principle by preventing altogether the discriminatory practice which was there only partially restricted. We showed in our report, page 553, that "The circumstances surrounding and subsequent to our decisions in the Traer case and Hocking Valley case are such that the practice based upon the rules there announced can scarcely
1559 be given the sanctity of long observance in considering the question of reasonableness or undue preference."

Effect of assigned-car rule: In passing upon the rule before us it is important to bear in mind the fundamental purpose of the act "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." New Haven R. R. v. Interstate Com. Com., 200 U. S. 361; Louisville & Nashville R. R. v. Mottley, 219 U. S. 467; United States v. Union Stock Yard, 226 U. S. 286. We have already noted the Supreme Court's language in the Illinois Central case as to our power to require "a just and equal distribution and the prevention of an unjust and discriminatory one." The court also refers in that case to the carrier's "duty to make equal distribution of cars," page 477, and "the duty of equality of treatment," page 473. In Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, 88, which related to assigned foreign railway fuel cars and private cars, we said:

"There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. • • • The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers."

One effect of the assigned-car rule, as we pointed out in our original report, pages 542 to 546, is to diminish the supply of cars at commercial mines. The extent of the diminution in car supply, as we also pointed out, is in dispute and is difficult to state in mathematical terms. Counsel representing the American Railway Association contend that, while on the whole it seems difficult, if not impossible, to name an exact figure which will represent the percentage of increase in the supply of cars to commercial mines which would be brought about by the abolition of the assigned-car privilege, 3 per cent would be more nearly a correct figure than any other which could be named. Opponents of the assigned-car rule on further hearing introduced further evidence on this phase of the case. This showed, among other things, that, if there had been a pro rata

distribution of all cars in the eastern and central regions of the Pennsylvania, which include that portion of the railroad from Cresline, Ohio, east to New York, the supply of commercial mines
1560 for the eight months ended April 30, 1923, would have been increased from 34.23 per cent to 54.02 per cent of the commercial cars ordered, or an increase of 57.81 per cent over the supply received by commercial mines during that period. From September 1 to March 1 during this period, the total number of cars available, assigned and unassigned, decreased from 165,016 the first month to 94,280 the last month, and the percentage of assigned cars available to all cars available increased from 25 to 65 per cent. The orders for commercial cars remained almost constant. The following table shows the situation as to car supply on the Cresson and South Fork divisions of this railroad from October 19, 1922, to April 30, 1923:

	Total required	Cars available		Percentage of cars available to cars required
		Assigned	Unassigned	
Cresson division:	*Cars*	*Cars*	*Cars*	*Per cent*
Railroad fuel cars	10,141.2	8,880.0	295.4	91
Private cars	21,253.8	20,447.9	1,062.8	126.1
Commercial cars	141,780.4	[1] 3,932.8	38,586.2	29.8
Total	173,179.4	30,260.7	39,977.4	44.4
South Fork district:				
Railroad fuel cars	53,119.1	11,955.5	510.2	82.5
Private cars	30,297.6	36,023.0	242.4	119.7
Commercial cars	97,117.9	[1] 3,286.9	28,778.7	31.1
Total	182,534.6	51,265.4	29,531.3	57.2

[1] Includes cars not assigned for railroad fuel but for other reasons not counted against the distributive share of the mines.

It will be observed that if there had been a pro rata distribution of all cars assigned and unassigned, the commercial supply on the Cresson division would have been increased from 29.8 per cent to 44.4 per cent, or an increase of 49 per cent, and on the South Fork district from 31.1 per cent to 57.2 per cent, or an increase of 83.9 per cent.

The supply of assigned and unassigned cars in the various districts of the Chesapeake & Ohio during the first three months of 1923 is shown in the following table:

District	Unassigned cars			Assigned cars		
	Ordered	Furnished	Percentage	Ordered	Furnished	Percentage
New River	94,390.0	27,471.8	29.1	3,980.5	3,494.7	91.7
Kanawha	82,618.4	20,295.3	30.0	3,394.6	3,008.6	90.4
Coal River	37,840.1	11,041.7	29.2	2,911.0	2,212.0	76.0
Logan	117,905.2	37,823.1	32.1	16,345.5	14,546.0	89.0
Kentucky	47,391.6	14,067.1	29.7	6,603.0	5,596.5	84.8
Total	380,173.2	110,698.0	30.3	33,244.2	30,918.4	97.7

1921 District	Total			Percentage increase[1]
	Ordered	Furnished	Percentage	
New River	109,356.4	32,966.5	32.8	12.7
Kanawha	71,014.0	23,330.9	32.8	9.7
Coal River	40,751.7	13,254.3	32.5	11.3
Logan	134,310.7	82,389.1	30.0	21.5
Kentucky	53,984.6	19,663.6	36.4	22.6
Total	409,417.4	141,604.4	33.4	15.9

[1] Last column shows percentage increase in commercial supply if all cars are distributed pro rata.

The evidence does not show the various classes of assigned cars, except that as to the Logan district it shows the 16,345.5 assigned cars ordered included 9,954.4 cars for Chesapeake & Ohio fuel coal and the 14,346 assigned cars furnished included 9,286.4 cars for Chesapeake & Ohio fuel coal.

The supply of cars, assigned and unassigned, in the Corning, Drakes, Fultonham, and Kanawha & Michigan districts on the Ohio Central lines of the New York Central Railroad for the first three months of 1923, is shown as follows:

District	Unassigned cars			Assigned cars		
	Ordered	Furnished	Percentage	Ordered	Furnished	Percentage
Kanawha & Michigan	60,625	17,619	29.0	6,029	5,436	87
Drakes	10,143	3,773	37.2	257	140	54.3
Corning	38,179	8,479	22.1	10,420	7,709	73.8
Fultonham	5,713	1,992	34.8	4,623	3,907	84.4
Total	110,660	31,863	27.9	21,343	15,192	70.8

District	Total			Percentage increase[1]
	Ordered	Furnished	Percentage	
Kanawha & Michigan	71,654	20,453	28.5	10
Drakes	10,770	3,913	37.1	1
Corning	38,795	16,188	41.7	28.1
Fultonham	10,349	5,567	53.8	62
Total	131,577	44,121	34.3	20

[1] The figures in the last column show the percentage increase in car supply which commercial mines would have received if there had been a pro rata distribution of all cars.

After weighing the evidence in the light of the various contentions made on this phase of the case, we think our former conclusion that the supply of cars at commercial mines would be increased by abolishing the assigned-car rule is fully warranted. This effect not only clearly appears from the evidence, but also the gross inequality of treatment as between assigned-car mines on the one hand and un-

1562 assigned-car mines on the other. As we pointed out in our original report, page 550, the result of inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production, and the amount of such increased cost is considerable and important. We think it unnecessary to add to what we said in our original report, page 550, as to the effect of the assigned-car practice, in attracting as many desirable miners as can be given employment to the assigned-car mine and away from commercial mines and in bringing about a more rapid labor turnover at the latter than at the former.

In our original report, page 547, we pointed out that the record indicated that upon the whole the wastage during periods of car shortage, which results from the holding over from one day to the next of cars set for loading, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. We see nothing in the evidence on further hearing to change our finding on this point.

Contentions as to necessity of assigned fuel cars: Respondents contend that the assigned-car rule as advocated by them is reasonable and not unjustly discriminatory because under it they are able to secure a regular supply of coal of proper quality at reasonable prices during car-shortage periods while without it they would not be able to do so. Before reviewing the large volume of evidence on this feature of the case it is important to bear in mind that the fundamental purpose of the act is equality of treatment in rates and service, and this principle may not be violated merely because the carrier in that way may operate at less expense. If this were not true a carrier in times of car shortage could restrict its car supply to a few large and well-operated mines on its line and ignore the remainder. In United States v. Ill. Cent. R. R. Co., 263 U. S. 515, the court said, page 523:

"The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. Interstate Commerce Commission v. Chicago Great Western Ry., 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. • • • "

That was a rate case, but the principle is applicable in a car-distribution case, that a carrier's self-interest may not override the requirement of equality in car distribution. See also Int. Com. Comm. v. Balt. & Ohio R. R., 225 U. S. 326.

Much of the argument as to economy of operation resolves itself into the proposition that a carrier is able to secure cheaper
1563 coal as the result of discriminating in its own favor through the use of the assigned car. As to this it is appropriate to

repeat what we said in our report of January 25, 1907, to Congress on "Discriminations and Monopolies in Coal and Oil":

"* * * The prevailing rule is that cars in which fuel coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel-coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.

"The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel cars, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation and gave him an advantage over a competitor who has no order for fuel coal."

While, as we pointed out in our original report, there was lack of evidence to show that railroads had used the assigned-car rule to coerce mine operators into selling their coal at unreasonably low prices, the evidence introduced at the original hearing and upon the further hearing shows that the carriers are able in consideration of furnishing a full supply of cars under this rule to make contracts for coal at somewhat lower prices than they could otherwise make.

Respondents contend that the table in our report of 52 carriers not using assigned cars does not, when considered in view of the evidence which they presented, justify the inference that carriers can secure their coal at reasonable prices during periods of car shortage without the use of the assigned car. However, as to the eight carriers, whose practices were shown on the further hearing, the evidence shows certain significant facts. The Great Northern and Chicago & North Western did not resort to the assigned-car practice in securing their fuel. The St. Louis-San Francisco in securing approximately 73 per cent of its coal from mines on its own line did not follow this practice, and followed it only to a limited extent, if at all, in securing the remainder of its coal from mines on other lines. The Atchison, Topeka & Santa Fe secured over one-third of its supply of coal without the use of assigned cars. The Carolina, Clinchfield & Ohio did not follow this practice in 1920 or in October, 1922, although it did so the latter part of that year. During 1920 and until the latter part of 1922 the Seaboard Air Line obtained practically all of its coal without assigned cars. The Delaware, Lackawanna & Western obtained 40 per cent of its coal in this manner. Our table shows that the Atlantic Coast Line
1564 and the Detroit & Mackinac did not follow the assigned-car practice in 1920 and were not following the practice on October

1, 1922, and that the Richmond, Fredericksburg & Potomac, while following the practice in 1920, was not using assigned cars on October 1, 1922. This showing remains uncontradicted, except that in the latter part of 1922 the first two carriers secured coal on the Chesapeake & Ohio in cars placed under the assigned-car rule, while the third carrier continued to secure its coal on that road without assigned cars. As to the remainder of the 52 carriers listed in our table as not using assigned cars, the showing made therein is neither contradicted nor modified. Among these are certain important roads like the Union Pacific, the Buffalo, Rochester & Pittsburgh, and the Mobile & Ohio.

The evidence on further hearing as to carriers other than those shown in our table furnishes in many instances added support for the conclusion that carriers in car-shortage periods may secure their coal at reasonable prices without the use of the assigned car. As illustrative of this, the Chicago, Burlington & Quincy, between the time of the original hearing and the further hearing in this case, secured over half of its coal without the use of assigned cars, during a period of sustained car shortage. This was true also in previous car-shortage periods, as shown at the original hearing. The New York Central secured about 26 per cent of the coal it consumed without the use of the assigned car. The Pittsburgh & Lake Erie, a part of this system and an important coal-loading carrier, did not follow the assigned-car practice in securing its fuel in the year 1920. The Michigan Central, also a part of the system, secured, since the period of Federal control, a substantial portion of its fuel in Michigan without the use of assigned cars, and from 1912 to 1917 procured all of its coal without assigned cars.

Many large and important carriers in representative sections of the country have secured their coal during periods of car shortage without resorting to the use of assigned cars, and many others have secured large portions of their fuel supply in the same manner. The evidence in the original record and upon the further hearing also shows that public utilities and quasi public utilities have been able to secure their coal without the use of the assigned cars. We pointed this out in our report, pages 552 and 553.

There is a large volume of evidence in the original record and in the record upon the further hearing as to the methods which carriers adopted, and which they could adopt in securing their fuel without the assigned-car rule. These include greater storage of coal during periods of inactive demand and a wider distribution of fuel contracts among producing mines, with a provision in some cases that railroad coal shall be delivered in preference to coal for other custom-
1565 ers. While the carriers contend that these methods are impracticable as substitutes for the assigned-car rule, the experience of carriers and other public utilities and quasi public utilities, which do not depend upon this rule in securing all or a large part of their fuel, and the other evidence in the record on this subject, con-

vince us of the practicability of securing railway fuel at reasonable prices in the absence of the assigned-car rule.

As stated in our original opinion, however, emergencies may arise when for a time a carrier may be unable to secure its coal. But we are not here dealing with the question of car distribution under the emergency provisions of section 1, paragraph (15). In our original report we expressly pointed out that the rule which we prescribed was not to preclude us from authorizing necessary assignment of cars in case of emergency. The question of a just and nondiscriminatory rule under the provisions of section 1 and section 3, with which we are now dealing, is a different question from that of a rule to be prescribed in case of emergency. The distinction is recognized in paragraph (15), where it is provided that we may suspend car-service rules at such times.

In the petition for rehearing filed by the American Railway Association it was alleged that the abolition of the assigned-car rule would add more than $100,000,000 a year to the operating expenses of the carriers, which must ultimately be met by the public. No figures were offered to show how this sum was computed, and there was a general failure of evidence to support this contention. As we have previously indicated, carriers which have not used the assigned-car rule in securing all of their coal, or a large part thereof, have been able to do so at fair prices. Moreover, as the result of inequality in working time caused by the assigned-car rule the costs of commercial mines are increased and the public in consequence must pay higher prices for coal. We referred to this in our original report, pages 550 and 551. It seems probable that, as one of the consequences of abolishing the rule, carriers will increase the storage of coal during periods of free-car supply and thus not only secure coal at low prices but make more equipment available for revenue service during periods of car shortage. The evidence shows that many carriers, as well as public utilities and important industries, store large quantities of coal and are able to do so at reasonable expense. Storage by railroads and others in periods of car surplus tends to equalize the demands by operators on railway equipment throughout the year and to prevent periods of extreme car shortage during which, because of the great demand for coal, inefficient high-cost mines spring into operation, and the public is required to pay excessive prices for coal.

1566 It has been suggested in this proceeding that elimination of the assigned-car rule would be an unwarranted interference by us with the carriers' right to purchase coal where and from whom they please. A similar contention was overruled in the Illinois Central case, 215 U. S. 452, 477, in which the court said:

"The right to buy is one thing and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things."

Special types of equipment: On further hearing, the contention is made that the side-dump cars of the Hocking Valley and the ballast and stock cars of the Atchison, Topeka & Santa Fe are special types of equipment which are used exclusively by these carriers in hauling their coal and can not be used by commercial operators at all, and that we are without authority to deal with such cars for the reason that—

"Cars of this type have never been impressed with the character of common-carrier instrumentalities. They are not used in commerce at all; they are used only in performing the private work of a railroad company."

The Hocking Valley cars were in commercial service for many years before they were put in fuel-coal service, and they are placed at partial-output mines selling commercial coal and are counted and distributed on a pro rata basis. The Atchison, Topeka & Santa Fe cars are placed at mines of this description and are counted under the assigned-car rule, and such cars may be unloaded by dumping like ordinary coal cars. The side-dump cars and the stock and ballast cars constitute part of the available equipment of these carriers for commercial shipments, and come within the class of equipment as to which Congress requires "a just and equal distribution and the prevention of an unjust and discriminatory one." Illinois Central case, 215 U. S. 452, 474.

It is contended that if the assigned-car rule should be abolished carriers will be deprived of the advantage of using a particular type of cars especially adapted for unloading at coaling stations. Our order, however, does not prohibit such use, but merely placement in excess of the mine's distributive share. The Hocking Valley as we have just pointed out, now uses its side-dump cars in securing coal from partial-output mines on a pro rata basis of distribution.

Railroad-owned mines: In what we have said we have dealt with railroad-owned mines as well as other mines. We shall here refer briefly to railroad-owned mines alone.

A statement filed by respondents shows 23 railroads owning mines. The ownership in nearly all cases is through subsidiary com-
1567 panies. Eleven[1] of the 23 had mines producing commercial coal as well as fuel coal. Four, the Chicago Great Western, the Chicago, Rock Island & Pacific, the Richmond, Fredericksburg & Potomac, and the Deleware, Lackawanna & Western had mines located on other railroads. Five, the Chicago & Western, the Great Northern, the Minneapolis & St. Louis, the Richmond, Fredericksburg & Potomac, and the Union Pacific are carriers which do not resort to the assigned-car practice. The Canadian National should be added to the four having mines on other lines.

[1] Atchison, Topeka & Santa Fe, Baltimore & Ohio, Central of Georgia, Chicago, Rock Island & Pacific, Erie, Great Northern, Minneapolis & St. Louis, Missouri Pacific, Northern Pacific, Southern Pacific, and Union Pacific.

Certain of the carriers owning mines emphasize the importance of having these mines from the standpoint of economy and efficiency. The Chicago, Burlington & Quincy closes down its mine during periods of car surplus, and distributes its purchases among commercial mines to help such mines and thus produce more revenue freight. Moreover, the evidence indicates that in some instances at least, coal can be secured more cheaply from commercial mines than company-owned mines because of the greater distance necessary to haul the coal in the latter case. The Atchison, Topeka & Santa Fe does not consume the output of one of the mines which its owns, because to consume it all would require hauling the coal unreasonable distances. The Chesapeake & Ohio mines are on a branch line. If all the coal this company consumes should be taken from these mines, it would have to be hauled into and through other coal-loading districts on the same railroad.

Private assigned cars

Much of what we have said concerning assigned cars for railway fuel is applicable to private cars.

Nearly all of the private-car owners who filed petitions for rehearing appeared in the original proceeding or had subsidiary or affiliated companies which did. They stated that the evidence which was introduced there did not fully disclose the necessity for the private assigned car in the various classes of industries relying upon it and contended that they should therefore be permitted to make a complete showing on this subject.

On the further hearing much evidence was introduced by such owners as to their individual situations and the economic necessity in each case of the assigned private car. The widest scope was allowed in the production of testimony as to these individual
1568 situations and needs. The names of the companies introducing evidence and the number of cars owned are as follows:

Bethlehem Steel Corporation	3,975	Seaboard By-Product Coke Company	350
Steel Company of Canada and affiliated companies	400	Chicago By-Product Coke Company	650
Carnegie Steel Company and other subsidiaries of United States Steel Corporation	5,200	Rainey-Wood Coke Company	400
Pittsburgh Plate Glass Company	200	Donner Union Coke Corporation	500
Ford Motor Company and subsidiary company	800	Berwind-White Coal Mining Company and subsidiary company	4,078
Youngstown Sheet & Tube Company	1,334	Westmoreland Coal Company	2,019
International Harvester Company and subsidiary	500	Public Service Electric Company	600

These companies owned about 21,000 of the total 29,286 coal and coke cars privately owned as of October 1, 1923.

In addition to the evidence offered by private-car owners, certain public utilities of the city of New York, which received large quantities of coal in private cars owned by others, introduced evidence

to show the necessity of the private assigned car. With the exception of the National Coal Association, the same associations which opposed the railway-fuel car opposed the private assigned car and in addition to these there were, among others, the Harlan Coal Operators' Association and the New River Coal Operators' Association.

Contention as to our authority: Some of the private-car owners content that the interstate commerce act recognizes private cars as legitimate, that the right of the owners to use such cars includes the right to have them placed at designated mines without restriction unless such use of cars result in preferential use of other equipment such as locomotives or tracks, and that we have no authority to abolish the assigned-car rule and require pro rata distribution, because, as they contend, the facts do not warrant us in finding that the use of such cars will result in preferential use of facilities other than cars.

In our original report, pages 554 to 559, we referred to various decisions in respect to private cars, and said:

"Throughout our reports we have held to the central idea that the carrier, in permitting the use of the private car, must at its peril see that the use of the vehicle does not permit, excuse, or justify a discrimination, preference, or advantage in favor of the owner of the private car, regardless of the present ability of the carrier to furnish on demand an adequate supply of equipment needed for transportation. Throughout we have recognized that when the carrier permits the use of the private car upon its rails, it is responsible for the manner in which the service is conducted in that car, and that the car becomes in all respects as if it were one of the general stock of those owned by the carrier, and subject to the same liabilities and responsibilities as to the use in interstate transportation."

1569 A statement of the general principles which should be applied is also to be found in United States v. Baltimore & Ohio Railroad Co., 165 Fed. 113.[1] In that case the Circuit Court of Appeals for the Fourth Circuit in dealing with the distribution of privately owned cars to coal mines called attention to the provisions of section 1 requiring carriers to furnish transportation upon reasonable request and to the definition of "transportation" in section 1 as including cars and other vehicles "irrespective of ownership or of any contract express or implied for the use thereof," and then proceeded as follows, pages 122 and 123:

"In passing upon the questions involved, it should be borne in mind that the statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the shipper. The duty thus enjoined cannot be evaded by the carrier by claiming that it is not the owner of the portion of the cars carried over its lines. The duty of furnishing equal facilities relates to and involves purely

[1] The case was later reversed by the Supreme Court in Baltimore & Ohio R. Co. v. Pitcairn, 215 U. S. 481, but on the ground alone that the lower court had no jurisdiction to pass upon the reasonableness of car-distribution rules, since the question was an administrative one for the commission.

the question of transportation, and when we are called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated. The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their investment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we cannot consider, inasmuch as the statute was not enacted for the purpose of promoting the interests of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.

"It is made the duty of the carrier to move the product of the shipper, and in doing so if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief accorded by section 23 of the act. If, as in this instance, a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement cannot in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a
1570 matter which it left entirely with the carrier; but, while such is the case, it is equally true that the carrier cannot, by any such arrangement, by indirection, accomplish that which is prohibited by the statute."

The private-car owners concede that the assigned-car rule established by the Hocking Valley case and Traer case is reasonable and lawful. In one of the briefs in behalf of many of such owners, it is stated that this rule "has the approval of the Supreme Court of the United States. Int. Com. Comm. v. I. C. R. R. Co., 215 U. S. 452." While the court in that case did not expressly pass upon the rule in so far as private cars were concerned, it may be considered as authority for the proposition that we have power to make such a

rule. The lower court in Chicago & Alton R. Co. v. Int. Com. Comm. 173 Fed. 930, in sustaining the rule as to private cars said, page 932:

"A charter duty of railroads is to provide cars, as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment."

The fundamental principle which has governed us in dealing with private cars is that such cars, being paid for by the carriers through allowances to their owners, are to be treated as part of the carrier's equipment, and may not be so used as to bring about unjust discrimination or unreasonable practices. Prior to the Hocking Valley and Traer decisions private cars were not taken into account at the mines to which they were assigned. Such mines received in addition their full pro rata share of system cars in the same manner and to the same extent as if the private cars were nonexistent. By these decisions, however, private-car owners who did not have sufficient private cars for placement at their mines to exceed the distributive share of such mines were deprived of the advantage of ownership of the cars just as private-car owners claim here that they would be deprived of the advantage from the ownership of their cars if the assigned-car rule should be abolished and the placement in excess of the distributive share of the mines be prohibited. The 1571 interstate commerce act not only confers authority upon us to restrict the preferential use of private cars as was done in those decisions, but authorizes us to prohibit altogether such preferential use. United States v. New River Company, supra, and cases therein cited. As we pointed out in our original report, page 561:

"A private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars, or is entitled to no preference whatsoever on account of that ownership, and a compromise is untenable."

The contention is made that paragraph (12) of section 1, which was incorporated into the interstate commerce act by transportation act, 1920, limits our power to change or extend by further limitation the rule laid down in the Traer case and Hocking Valley case. That this was not the intent of Congress, we think, is clear. In this connection, it is to be observed that the Supreme Court in United States v. Pennsylvania R. R. Co., decided November 17, 1924, used the following language:

"* * * There is nothing in the act to regulate commerce as originally enacted, or in transportation act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the commission's powers to prevent unjust discrimination * * *."

Private cars which are paid for by carriers for use and are used on their lines are clearly "facilities possessed," and come within the broad powers conferred upon us by the statute to prevent unjust discrimination.

As to the contention of private-car owners that they are entitled to unrestricted use of their cars unless this involves some preferential use of facilities other than cars, we may repeat here what we said in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, at page 92:

"The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private coal car or the possession of a foreign railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. When any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the commission has said on those questions in its formal decisions."

1572 In the report of the American Railway Association conference committee to the United States Coal Commission, dated June 1, 1923, which is in the record, the following appears:

"'Coal car shortage,' while a term generally used, is commonly a misnomer; 'transportation shortage' would be more exact or more properly descriptive. From the viewpoint of the mine management a 'car shortage' exists when cars are not placed on mine tracks in sufficient quantity to fill car orders. From the viewpoint of the railroad management the situation may rather be considered a 'trans-

portation shortage,' for at such a time there may exist no 'car shortage' on the railroad as a whole. That is, even though all car orders are not filled there may be in the road's possession as many coal cars in the aggregate as in previous periods when the mines it served loaded a greater amount of coal and the needs of such mines for cars were more adequately or fully met.

"When labor disturbances cause abnormal demands for coal to be delivered in certain sections of the country within a certain period, the coal moves to meet these demands via routes and gateways in quantities far above the normal, or average, movement through such channels and also via unusual routes. Because of this abnormal coal movement, yard tracks, main tracks, terminals, lake and tidewater piers, and various other facilities become overtaxed or congested, with a consequent slower movement and longer turn-around of cars. This results in what the mine management terms a 'car shortage.'"

As we pointed out in the Rail and River case, "A shortage in cars usually if not invariably is accompanied by a shortage in some one or more of the other facilities of the carrier." Locomotives, tracks, employees, terminal facilities, etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities. Some of the more aggravated cases of discrimination shown under the assigned-car rule were during car shortages resulting in part at least from lack of motive power and limited track facilities. Some of these cases were cited by private-car owners as examples of the necessity of the assigned car. As illustrative of this, the United States Steel Corporation, International Harvester Company, Chicago By-Product Company, and Ford Motor Company, through subsidiary companies, operate large mines in the Harlan district of the Louisville & Nashville in Kentucky, and severally own about 4,000 private cars used in serving their respective mines. The evidence shows that this carrier was unable, because of limited track facilities among other things, to handle all the cars required by the mines in this district, and yet private-car mines received practically full car supply while other mines in the district received less than a 30 per cent supply for substantial periods. Other divisions of the same railroad not only had a
1573 larger percentage of cars than the Harlan district, but at times during the car shortage it was shown that this carrier notified connections not to deliver empty cars to it.

In determining upon a just and workable rule, we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power, etc., and that to permit private-car owners to have their cars placed at designated mines in excess of the pro rata allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own, while to require pro rata distribution of cars is to bring about a just and nonpreferential distribution in conformity with the fundamental requirements of the act.

Contention as to necessity of private assigned cars: As we have indicated, much evidence was introduced by private-car owners to establish the necessity of the use of private cars under the assigned-car rule. Much emphasis was laid upon the technical processes involved in the making of by-product coke and the necessity of having a regular supply of coal of proper quality for coking purposes. The principal witness on this subject was the president of the Seaboard By-Product Coke Company and the Chicago By-Product Coke Company. The situation as to the former is typical and will be briefly summarized:

The Seaboard By-Product Coke Company operates 165 by-product coke ovens at its plant in Kearney, N. J., in which it uses about a million tons of coal a year in producing about 750,000 tons of coke. In this process gas and other by-products of the coal are recovered. The gas is supplied to a public-service gas company. Of the coke 60 per cent is sold to public utilities for the manufacture of water gas and the remainder is sold to industrial and domestic customers. The by-product company is under contract to furnish daily a fixed amount of gas to the gas company, which under its franchise must supply gas to the public. Continuous operation of the by-product plant is necessary in order to supply the gas contracted for and to furnish a regular supply of coke to gas companies for the manufacture of water gas. By-product ovens are lined with specially molded silica brick, and require a gradual heating of from six to eight weeks to put them in blast. Rapid heating will expand the oven walls, destroy them, and require rebuilding at substantially replacement cost and with long delay. Sudden shutdowns will likewise wreck the ovens. The witness estimated the cost of replacement to be from $300,000 to $500,000, depending upon the size of the plant. It is important to have a continuous supply of uniform grades of freshly mined coal from selected mines in order to comply with specifications as to gas and to produce coke suitable for water gas manufacture and for the metallurgical and domestic
1574 trade. Unknown and varying coals will cause serious injury to the ovens by reason of expansion or crumbling during the coking process. Determination of correct mixtures of coal is a delicate operation, requiring much time and many tests in test batteries of ovens. The company ordinarily keeps in storage about two months' supply of coal to guard against a breakdown in transportation or trouble at the mines. Such coal must be mixed with freshly mined coal to produce satisfactory results.

In 1919 and 1920 the Seaboard By-Product Company was unable, because of car shortage then existing, to secure suitable coal under contracts which it had. Additional coal was purchased to keep its plant in operation, but this was of poor quality and resulted in bad coke. In 1920 the company acquired 350 cars, and has been able to have these cars assigned and has thus secured suitable coal and operated its plant satisfactorily during car-shortage periods.

In the last 10 years over $200,000,000 has been invested in by-product coke plants and their accessories, and a tremendous saving in natural resources has resulted from the use of this process. The by-products thus saved are estimated to be worth about $4 for each ton of coal coked.

The steel companies also emphasized the necessity of private assigned cars in securing coal of proper quality for the by-product coke-plants which they operate in connection with the manufacture of steel. Large quantities of gas are supplied by such companies to public utilities. It is important in producing steel to have coke made from coal of proper physical structure and metallurgical content. Sulphur and phosphorus in the coal used for coking will continue throughout the process and impair the quality of the finished steel. Many of these companies own outright or through their subsidiary companies mines selected because of the suitability of the coal produced for steel making and use their private cars for transportation of the coal from their mines to their own plants. Some of such mines ship only to the industries which own them. When coal can be obtained and stored the steel companies generally carry a sufficient supply in stock to take care of their requirements during any ordinary period of irregular coal supply or interrupted transportation service.

The Berwind-White Coal Mining Company and its subsidiary, the New River & Pocohontas Consolidated Coal Company, own 4,078 private cars which are used in transporting coal from mines which the former company owns on the Pennsylvania and from mines which the latter company owns on the Chesapeake & Ohio.

The subsidiary company also owns mines located on the
1575 Norfolk & Western. These companies supply large quantities of coal to railroads and public utilities and to steamship companies for bunker coal. They have owned the cars for many years, and contend that such cars under the assigned-car rule are a necessity in order to insure regular delivery to their customers.

Evidence of similar character was introduced by other private-car owners. While all of them contend that private assigned cars are necessary in their industries and in some cases allege that disaster will result if they are deprived of the assigned-car privilege, the record shows that many of such owners secure large quantities of coal without the assigned car. As illustrative of this, the Carnegie Steel Corporation and other subsidiaries of the United States Steel Corporation normally receive by rail 20,000,000 tons of coal annually, one-half of which is used in their mills for producing gas and steam and one-half in their by-product coke ovens. These companies own 5,200 coal cars. Of the 20,000,000 tons 5,000,000 are moved in these cars. About 12.5 per cent of the 10,000,000 tons of coal for gas and steam and about 37.5 per cent of the 10,000,000 tons used for by-product coke are moved in this manner. Another illustration is to be found in the Pittsburgh Plate Glass Company, which owns about 269 cars and uses them in securing coal for its plants in the

Pittsburgh district, but obtains coal in system cars for its other plants in Indiana, Ohio, and Missouri. The Youngstown Sheet & Tube Company obtains 49 per cent of its coal in system cars. This includes both high-volatile and low-volatile coking coal. The New York Edison Company and the Consolidated Gas Company of New York each receives about two-thirds of its coal in system cars. Large quantities of coal are secured by private-car owners from mines on the Norfolk & Western, which does not handle private coal cars during car-shortage periods or at any other time. The evidence presented showed that many public utilities, including street railways, obtained their coal without private cars. It further shows that many mines in the districts where private cars are used produced coal for by-product coke, bunker coal, and other kinds of coal in competition with that moved in private cars.

It is to be observed that many of the private-car owners appearing in this case did not purchase cars until the abnormal period following the termination of Federal control of railroads. The following companies, for example, first acquired their cars in 1920: Steel Company of Canada and affiliated companies, International Harvester Company and its subsidiary company, Bethlehem Steel Company, Youngstown Sheet & Tube Company, and Seaboard By-Products Coke Company. The Pennsylvania Coal & Coke Company
1576 acquired its 1,000 cars between the time of the original hearing in this case and the future hearing. The president of this company at the original hearing opposed the use of private cars. 1,004 cars of the Ford Motor Company and its subsidiaries were also acquired subsequent to our original hearing in this case.

Many of the private-car owners deal with the contention of opponents of the private car that mines supplied with private cars have better working time than unassigned-car mines, by saying in a brief which they filed:

"Only in a car shortage period, however, can the ownership of private cars be a matter of moment, for at all other times all mines are supplied in full of all car requirements. While it is a fact that since 1916 coal car shortages have been common, that is not the normal situation. Once we are out of our war and post war difficulties, the opposite condition, one of coal car surplus, may be more regularly contemplated."

This statement is justified by the record.

The fundamental problem is to determine whether differences in transportation conditions justify the inequality of treatment resulting from the assigned car rule. The evidence which has been presented as to the economic necessity of individual shippers or classes of shippers does not, we think, warrant us in concluding that this inequality of treatment is justified under the provisions of sections 1 and 3 of the act. Compare Rates and Charges on Grain and Grain Products, 91 I. C. C. 105. In case of emergency we may grant relief under the provisions of paragraph (15), section 1. What is reasonable action under that section, however, as we pointed out in

our discussion of fuel cars, is a different question from the one presented here.

Extent of discrimination: We have already dealt generally with the discriminatory effect of the assigned-car rule as applied to both fuel cars and private cars. Opponents of this rule introduced evidence to show the adverse effect of the rule in respect to private cars, particularly on the Louisville & Nashville, the Chesapeake & Ohio, and the Pennsylvania. It was shown that during car-shortage periods private-car mines received practically a full car supply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars ordered. Private-car owners themselves, in introducing evidence as to the necessity of the assigned-car privilege, showed in many instances the discriminatory effect of the rule. During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than 1577 other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate. As illustrative of this, the Fordson Coal Company, a subsidiary of the Ford Motor Company, had a car supply of approximately 22 per cent at its mine on the Louisville & Nashville for the six months' period prior to the first placement of its private cars at its mine in February, 1923, and was able to produce only about 34,000 tons of coal a month, while in March with practically a full supply of private cars it was able to produce about 72,000 tons, although the car shortage continued. The costs per ton were reduced from about $4 in November, 1922, and $3 in January, 1923, to $1.93 per ton in March, 1923, and labor at the mine was better satisfied. During the period when the Fordson Coal Company was dependent upon system cars other private-car owners in the same district received practically a full supply of private cars at their mines.

Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they are willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. The Westmoreland Coal Company showed, for example, that for the two years and nine months ending September 30, 1923, the revenues received for the use of its 2,019 cars were $784,424, expenses for repairs amounted to $820,755, total expenses including interest and depreciation amounted to $1,329,488, and the net loss to the company was $545,064, or a loss per ton of coal handled in private cars of 18 cents in 1921, 13 cents in 1922, and 8 cents in the first nine months of

1923. Private-car owners, it is to be observed, use their cars through out the year, both in periods of car shortage and in periods of full car supply.

As to the contention that the use of private cars during car-shortage periods releases railroad cars for commercial mines, which otherwise would have to be placed at private-car mines, "this overlooks the fact," as we pointed out in our original report, "that particularly in time of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more important to him than a slight addition to his allotment effectuated by giving his neighbor and competitor a better car supply." Furthermore, if private cars should be withdrawn from carrier service and the remaining supply of cars should
1578 be inadequate, we have power under the act, as we also pointed out in our report, to require the carriers to furnish an adequate supply.

Contention as to impairment of investment: Some of the private-car owners contend that they have invested many millions of dollars in reliance upon the rule laid down in the Hocking Valley case and Traer case, and that if we should now prohibit placement of such cars in excess of the pro rata allotment of the mines to which they are assigned or consigned we would take away the only advantage of such cars and in practical effect wipe out the investment which has been made.

In our original report we did not find that the use of private coal cars should be prohibited or that they should not be placed at the mine to which they were consigned. What we did prohibit was the placement of such cars at a mine in excess of the pro rata share of available cars. Private-car owners were left free to continue to use their cars and to have them so distributed to designated mines as not to exceed the pro rata share of such mines. That large sums may have been invested in reliance upon a rule which is unreasonable and unjustly discriminatory or may become or be found so under the interstate commerce act does not mean that we are powerless to change the rule and prescribe a just and nonpreferential one. Douglas v. C., R. I. & P. Ry. Co., 21 I. C. C. 97, 101; So. Pac. Co. v. I. C. C., 219 U. S. 433; and Louisville & Nashville Ry. Co. v. Mottley, 219 U. S. 467.

If we permit the assigned-car rule to continue, it is reasonable to expect that the number of private cars will increase, and, as we said in our original report, page 559:

"The result is not only an increasing gross inequality between users of this form of equipment who are able to afford the very considerable expense in procuring and maintaining such equipment, reflected immediately in the disproportion between the amount of their output or consumption, as the case may be, but also that the available facilities of the railroad carrier other than cars—locomotives, tracks, and terminals—are taken up in great degree by

such classes of preferred users, so that the commercial mines are and will find themselves unable to procure transportation for even the ratable share of the cars which the carrier owns and sets for them."

Upon the facts shown of record we affirm the findings in our former report, 80 I. C. C. 520, and find and conclude that in the distribution of cars for transportation of coal among the bituminous-coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, or whether owned or leased by or furnishing their entire output to a respondent, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel
1579 purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading, currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall prevent the assigning of privately owned cars or cars for railway fuel to designated mines, provided such mines are not thereby given more than their pro rata share of available cars. It is also not intended that this finding shall preclude the commission hereafter in proper cases in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide.

The effective date of our order entered in this proceeding June 13, 1923, has been postponed until January 15, 1925. The statutory period of notice is not less than 30 days. We will enter an order making that order effective on March 1, 1925.

EASTMAN, Commissioner, concurring:

I concur in the majority report, except so far as it sustains the conclusion of the original report with respect to the interpretation of paragraph (12) of section 1 of the act. My views with respect to that paragraph were stated in my former separate expression, 80 I. C. C. 520, 563, and to these views I adhere. Commissioner Campbell joins me in this expression.

1580 HALL, Chairman, dissenting:

The considerations which prompted my dissenting expression appended to the former report, 80 I. C. C. 520, at 564, are fortified and confirmed by the additional record now before us. I can not escape the conviction that the majority have gone outside of transportation conditions, and thus outside of the proper scope of our powers, to make their findings of unreasonableness and undue prejudice. To my mind these findings are baseless, without warrant in fact or law, and I can not refrain from saying so when, under guise of a decision by this commission, they become armor, shield, and sword for a grave menace to the common welfare. Those who have experience in such matters well know that no workable substitute has yet been devised for the assigned car in supplying carriers with necessary fuel during periods of car shortage, and that if and when those periods come our priority orders must require what is here condemned by the majority as unlawful.

The private car, as my brother Daniels observed in his dissent from the former report, is not an outlaw. It has its uses at all times, and not merely in times of emergency. Under proper regulation, such as we have devised or can devise, it should continue to perform its important functions. The power to tax may be the power to destroy, but that it is not true of the power to regulate.

POTTER, Commissioner, dissenting:

I am unable to agree with the majority report on further hearing. I set forth my views at some length in my former dissent, and would not find it necessary now to elaborate were it not for the additional facts developed upon the further hearing, which to my mind demonstrate the unsoundness of the majority view.

There are two aspects of this proceeding which were brought into brighter light upon further hearing. One is the propriety and necessity for assigning cars at railway-owned mines or at total-output contract mines located upon the line of the owning or contracting carrier where such contract extends over a considerable period of time. It has been made to appear that to so assign cars is squarely within the intent of Congress in enacting paragraph 12 of section 1 of the interstate commerce act, and in accordance with the view of the commission which recommended the enactment of that section because such assignments were essential and for the express purpose of sanctioning them. The other aspect is presented by the additional testimony as to the importance of the use of the private car as essential to certain lines of industrial development, and par-

ticularly to the by-product coking industry and the ramifications thereof. In my original expression I alluded to the effect of
1581 the majority report, if not set aside by the courts, upon the steel industry and certain others. The additional testimony upon further hearing demonstrates that the majority report, if given effect, will attack in a most disastrous way a vast and growing industry based upon the by-product coking process, which is perhaps the most glorious achievement of this country along scientific lines.

Assigned cars for railway fuel

Many of the ills with respect to the assigned car for railway fuel arose from the day-to-day assignment, or, stated differently, at mines from which the carriers secure only a part of their fuel requirements. In the original report the majority set forth the rules which the carriers at that time advocated. These rules followed a literal compliance with the rules prescribed by the commission in the Hocking Valley case and Traer case, with the added proviso that cars assigned to mines for loading of other coal upon order of the Interstate Commerce Commission would be designated as "assigned cars." Under a literal interpretation of our decisions in those cases it would seem that the day-to-day assignment was permissible. In them we stated that where a carrier owned the mine, or contracted to take its entire output, the cars need not be counted. We did not specify the period of time for which such total output was to be taken. Many of the carriers, in apparent compliance with these decisions, took the output of certain mines on a day-to-day basis, and furnished such mines on such days during car-shortage periods cars in excess of the pro rata share to which those mines would have been entitled if shipping wholly commercial coal. The next day or days such mines would again be placed on the commercial basis, but the excess cars placed at the mine on the day on which the railroad took the entire output were not taken into account, that is, there was no equalization effected on the subsequent days when cars were placed for commercial loading. The result was, that such a mine undoubtedly secured a preferential car supply on such days on which it supplied its entire output to the carrier.

The record indicates that some of the operating officials of the carriers did not comprehend what was embraced in the term "assigned car." This was emphasized by an exhibit filed subsequent to the hearing, which is a compilation of replies made by certain of the respondents to an inquiry addressed to them by the car-service division of the American Railway Association. These replies in some instances contradict the oral testimony given by witnesses for the same carriers. This misunderstanding, and the abuses of the rules which followed therefrom, makes it certain that some
1582 uniform rule should be adopted. This is now recognized by the respondents. Upon the further hearing they did not in

sist upon the right to assign cars at partial-output mines, but insisted upon the right to assign cars at railroad-owned mines, or at those from which they take the entire output over a substantial period of time, thus eliminating those mines entirely as effective competitors of mines shipping coal commercially.

In the original majority report the history of paragraph (12), section 1, of the interstate commerce act is set forth in some detail. From what is there stated it seems clear that what the Congress intended was not to prohibit the assignment of cars at railroad-owned mines or at total-output mines, but that it clearly recognized, as this commission has in numerous decisions, that the carriers were at liberty to place cars at such mines without regard to the distributive share to which those mines would be entitled if shipping coal commercially.

The language of paragraph 12, it seems to me, is clear on this point. It provides that it shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. The first question to be determined is whether railroad-owned mines or total-output contract mines are served by the carrier, and therefore whether there is any duty upon the carrier to make just and reasonable distribution of cars for transportation of coal amongst such mines. A railroad sells transportation. That is its function. It does not sell transportation to mines which it owns, or to those from which it has contracted to take the entire output over a long period of time. Webster's Dictionary defines the word "serve" to mean "to work for, to labor in behalf of, to be in the employment of, etc." The first sentence in paragraph 12 relates to carriers which serve coal mines. It seems clear that when a carrier places at its own mine, on its own line, or at a mine on its line from which it purchases the entire output, such coal to be used as company fuel, the railroad does not serve the mine. On the other hand, the mine serves the carrier. The seller serves the buyer. The mine sells its services and product and serves the carrier for compensation. The merchant serves his customers. The gasoline station serves the automobile owner when it places gasoline in the automobile tank. When a railroad sells transportation to a coal producer it serves the latter, but when a coal mine sells coal to a railroad its position is reversed, and the coal mine then serves the railroad. The fact that the railroad supplies some of the
1583 instrumentalities for removing its own coal from the mine does not change the relation. If a retail coal dealer sells coal to a householder, the relation of buyer and seller is not changed by reason of the fact that the buyer brings his own conveyance and takes the coal home. The difference is merely in the extent of the service rendered by the seller. It seems to follow that when a railroad contracts with a mine to supply it with coal over a substantial

period of time, or when the railroad owns the mine which supplies it with fuel coal, the coal mine becomes the servant of the railroad for hire, and the railroad by placing cars, which for the time being are company-service cars, at the mine for loading coal, is serving itself just as much as when it places cars at a coal-stock pile to be loaded by its regular employees.

In both instances the loaders are serving the carrier; in the one case the employee sells his service, in the other he sells his service plus his product. It should be noted here that freight service supplied by a railroad is made up not only of human labor; it includes coal, oil, or some other fuel which is converted into and supplied in the form of energy so that even when a railroad serves a coal shipper by transporting its product it also supplies coal as well as human labor. The foregoing only applies to owned or long-term contract mines located upon the line of the owning or contracting carrier's line. The needs of the foreign carrier with respect to its fuel supply are, if anything, more urgent than those of the carrier which has coal mines located upon its line. Any rule, therefore, which is adopted with respect to the assignment of system cars should likewise apply to the assignment of foreign railway fuel cars.

The opinion of the majority relies upon the decision of the Supreme Court of the United States in Interstate Commerce Commission v. Ill. Cent. R. R. Co., 215 U. S. 438, as sustaining the position that we have authority to regulate the supply of cars at railway-owned mines or at total-output contract mines even where that contract extends over a long period of time, and they quote at some length from the decision of the court to sustain that view. The question before the court in that case, however, was whether we were correct in our finding that fuel cars, both system and foreign, at partial-output mines, and private cars, should be counted in the distribution of available cars. The question of assigning cars at railroad-owned mines or at total-output mines was not before the court. That decision seems to hold that under section 1 we have the power to control the facilities of the carrier, even though used for its own private purpose, where necessary to avoid undue preference and prejudice under section 3. It is conceded in this record

1584 that the only prejudice or discrimination as between a railroad-owned mine or a total-output mine and the mine which ships its coal commercially is in the labor market, or, as stated by one of the counsel at the argument, competition in the upkeep of the mine or ability to purchase coal as advantageously as the assigned-car mine produces it, whether it be classified as labor, supplies, or overhead.

In the prior report the majority found that there were more than enough miners to produce coal for all purposes, and that there were more mines than is consistent with the most efficient use of equipment, and that their aggregate capacity exceeded the country's demand.

The mining of coal does not constitute interstate commerce, neither is the hauling of coal or other company material for its own use common carriage by railroad within the purview of the act.

The question of mine labor necessarily takes into account differences in circumstances arising before the service of the carrier begins, and I am unable to follow the majority that we can take those facts into consideration in determining whether undue preference or undue prejudice exists under section 3. We have the undoubted right, under the interstate commerce act, to control the facilities of the carriers so as to avoid unjust discrimination or undue prejudice as between shippers or receivers of property. We can not, however, regulate the coal industry except as it is incidentally affected by a proper regulation of car supply as a matter of transportation. The railroad-owned mine or the total-output contract mine are operated continuously the greater part of the time whether there is a car surplus or a car shortage. Other mines operate only when they have orders for coal, and in many instances only in periods of peak demand and high prices. It is only natural, therefore, that mines operating practically full time can command the better class of mine labor. It seems to me that if, during periods of car shortage, we were to undertake to regulate the car supply so as to result in equal working time for all mines, we would be going far afield in the regulation of transportation with which we have to deal.

The finding of the majority, as I interpret it, predicates the finding of unreasonableness, unjust discrimination, and undue prejudice chiefly on the ground of the effect which the unequal distribution of cars has on mine labor.

In a series of decisions under Docket 12000, Construction and Repair of Railway Equipment, we considered the practice of the carriers in using outside shops in repair and construction work, and found that they made unreasonable and uneconomical expenditures. We censured the carriers for exercising their best judgment in having repairs made at a time when such repairs were necessary at
1585 outside shops instead of resorting to their own shops. The majority opinion in this case, it seems to me, is just the reverse of what the commission found in the case cited. Take the Chesapeake & Ohio as an example. It owns three mines, and employees in those mines are on the Chesapeake & Ohio pay roll, the same as any employees which operate the railroad. We, in effect, are saying to the Chesapeake & Ohio, that "although you can mine your coal cheaper in your own mines than you can secure it from elsewhere during periods of car shortage, nevertheless, you must not place cars at your own mines in excess of the pro rata share, and you must secure your other coal elsewhere at whatever price it is necessary for you to pay therefor."

On page 719 the majority report refers to certain further evidence introduced by opponents of the assigned-car rule on further hearing. The summation of the evidence referred to, which was in the nature

of an exhibit filed, shows that had there been a pro rata distribution of all cars in the eastern and central regions of the Pennsylvania Railroad the supply to commercial mines for the eight months ended April 30, 1923, would have increased from 34.23 per cent to 54.02 per cent of the commercial cars ordered, or an increase of 57.81 per cent over the supply received by the commercial mines during that period. I think this is an erroneous conclusion to draw from the evidence. The exhibit in question shows, for example, that there were available for the month of September, 1922, more than 17,000 assigned cars in excess of requirements.

It is well known that we were in the throes of a coal strike from the first of April until well along in August, and that the large majority of mines in the central region of the Pennsylvania Railroad were union mines, and therefore closed down during the period of the strike. Many of those mines are owned by private-car interests, and many of the assigned cars available were doubtless private cars being held at the mines of the owners for the resumption of mining operations.

The central region of the Pennsylvania also supplies a large quantity of railway fuel not only for the Pennsylvania Railroad but for other carriers. If the assigned cars had been prohibited at that time, as the majority report now would prohibit them, the private cars, as well as many of the fuel cars, would not have been in that particular region at that time. To say, therefore, that the percentage of cars at commercial mines would have been increased to the extent indicated, is fallacious. The private cars could not be placed by the carrier at mines other than as directed by the owner of such cars. If those cars were eliminated and the railway-fuel cars prorated in the district of division in which they were on the particular dates covered by the exhibit, it may well be that the carrier would
1586 then have been guilty of unjust discrimination in the supply of cars as between divisions or districts, which it would have been necessary for it to have equalized later.

Private cars

Prior to our decision in the Hocking Valley case the carriers generally followed the practice of not counting private cars in the distribution of cars to coal mines. The mines were given all the private cars, assigned or consigned to them, and in addition their pro rata share of the available carrier equipment. In the Hocking Valley case we held that the private cars should be counted and considered in the distribution of equipment; that the owners or receivers of such private cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars was less than their pro rata share of the total available cars, including system cars, foreign railway-fuel cars and so-called private cars.

In United States *v.* Baltimore & Ohio R. R. Co., 154 Fed. 108, the Circuit Court of the United States for the District of Maryland

had before it practically the same issue as before us in the Hocking Valley case. In that case a petition for mandamus was filed to require the Baltimore & Ohio Railroad to cease from subjecting the relator and other coal companies on the Monongah division to undue and unreasonable discrimination in the shipping and transportation of coal. It was a practice of the respondent at that time to place private cars at the mines without taking those cars into account in arriving at the pro rata distribution to which the mine was entitled. In other words, the mine was given all the private cars assigned or consigned to it and in addition its pro rata share of system cars. The court in substance found as we had previously found in the Hocking Valley case that the owners of individual cars or those entitled to them by contract were not to be deprived of the exclusive use of such individual cars, but that such cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars. At page 114 the court said:

"It would not be reasonable to hold that the exclusive use of individual cars by the mine operators under a system which has grown up during half a century and under which the trade has enormously developed, and upon the faith of which mine operators have invested millions of capital, often at times when the railroad company had neither money nor credit with which to increase its equipment, is now to be denied unless it could be done upon fair terms mutually acceptable to the mine operators and the railroad. The use of individual coal cars is not peculiar to the Baltimore & Ohio Railroad,
but has been quite generally used from the beginning of the
1587 coal trade in the United States and in England. While it is true that, if the railroad was so disposed, it might by not keeping up its coal car equipment gradually force all mine operators to provide individual coal cars, which would in the end leave in the business only those operators who were able to obtain and profitably use the large capital required to purchase individual cars, it does not appear that the railroad has pursued that policy. On the contrary, in 1905 it ordered 5,000 new coal cars of large capacity, increasing its total coal car equipment to about 45,000, and also increased its engine equipment so that it is abundant. Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary, it is only just. But, under the actual circumstances of the business of the coal trade on the Baltimore & Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a large number of

individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free equipment cars which the railroad has at its disposal, it still is a fact that in times of car shortage the demands so great that all the mines having individual cars require and get their full percentage of the railroad's equipment without reference to their own cars.

"Under the provisions of the interstate commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever. The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If, for convenience or of necessity, the vehicles are furnished by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road. These regularly run individual cars occupy the tracks and sidings. They are drawn by the locomotives, and are operated by the employes of the railroad company, and must lessen the facilities in that respect of the independent operators. Indeed, an objection of the railroad company to individual ownership of cars is that they require special switching and special care to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that, when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation, and not to first deduct the individual cars and give the independent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars, and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate commerce act. The mine operator would in any state of the car supply continue to get the exclusive use of his individual cars as before, but, when the supply was short, he would not get so many of the railroad's
1588 general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region."

This case came before the United States Circuit Court of Appeals for the Fourth District on writ of error upon the judgment of the lower court by both the petitioner and respondents. In U. S. v. Baltimore & Ohio R. R. Co., 165 Fed. 113, the court affirmed the decision of the lower court on the question of private cars. The case

reached the Supreme Court of the United States upon error prosecuted by the Baltimore & Ohio Railroad and the Fairmont coal companies, and in Baltimore & Ohio v. Pitcairn Coal Co., 215 U. S. 481, the Supreme Court reversed the decision of the lower court in all particulars on the ground that the court was without jurisdiction to pass upon the matters involved until after the commission had been properly afforded an opportunity to exercise its administrative functions. In the majority report reference is made to a statement of the general principles which should be applied as found in the decision of the Circuit Court of Appeals in the case cited, and an extract from that decision appearing on page 122 is quoted. The principles there set forth are in entire accord with what the commission has always held should govern. In fact, the private-car owners are seeking no different principles in this proceeding. They are contending for the right to have the exclusive use of their private cars even though during periods of car shortage the private cars so placed at a mine may exceed the pro rata share to which that mine would be entitled if dependent solely upon system cars. They are seeking this right only in the event that there is a shortage of cars unaccompanied by a shortage of locomotives, track facilities, congestion, or any cause which would tend to interfere with normal operation of the carriers. In the event that by the placement of private cars in excess of the pro rata distribution and undue proportion of the general facilities of the carrier are accorded to the private-car owners and thus denied to users of system cars, the private-car owners are willing to share the disability with all other shippers.

Under the majority decision, however, under a situation such as this the private-car owner would be denied the right to have its cars placed in excess of the pro rata distribution and the cars over and above such pro rata distribution would remain idle; this during a period when there was a general clamoring for coal with the resultant high prices. The majority report also refers to and quotes at length from the decision of the commission in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. 86, at page 92. In that case the commission adhered to what it had previously found in the Hocking Valley case, and the paragraph quoted is in entire accord with what the private-car owners are here seeking.

1589 In its report to the Congress on discriminations and monopolies in coal and oil, made in 1907, the commission expressly recommended that "after reasonable time carriers engaged in interstate commerce be prohibited from using 'individual' or 'private cars' for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company, and subject to distribution according to the system or plan in effect at that time."

Congress did not take the affirmative action recommended although the commission in many of its annual reports to the Congress embodied recommendations of like effect.

In Ruttle v. Pere Marquette R. R. Co., 13 I. C. C. 179, the commission in dealing with the private-car situation, said: "But while the rigth to use private cars may doubtless be denied to shippers by appropriate legislation, we are not prepared, in the absence of a specific enactment to that effect, to say that their use is in itself unlawful. Whether under a given set of circumstances their use results in an unlawful advantage to their owners and in an unlawful disadvantage to others is another question, which under existing legislation is clearly under the control of the commission and may be made the basis of such relief as the facts in any particular case may justify."

Private cars have been in operation in this country over half a century. The record shows that the Westmoreland Coal Company has been operating private cars for more than 60 years and the Berwind-White Company for more than 35 years. Under the system of private ownership of coal cars the trade has enormously developed and dependent upon its continuance these mine operators and others have invested millions of capital, often at times when the railroads had neither money nor credit upon which to increase their equipment.

Under the circumstances it seems clear that it would not be reasonable to hold that the exclusive use of such private cars should be denied, in times of car shortage, even though the private cars so placed at the mine are in excess of the pro rata share of cars currently accorded mines dependent upon system cars. The use of the private car during car-shortage periods increases the supply of system cars available to the operators dependent upon them and is a real benefit.

This naturally leads to the question, what is the material complaint against the use of the private car? Here again the answer is, as in the railroad-owned or total-output contract mine, the labor supply, but as heretofore pointed out, this is a matter which precedes any transportation service which a carrier is called upon to perform,

and is not a matter upon which we could predicate a finding
1580 of unjust discrimination or undue prejudice. Orders under section 3 are usually in the alternative and give the carrier the option of removing the undue prejudice in one way or another. In the event that the order were made in the alternative in this case, by what means could the carrier comply with our order? It certainly has no control over the mines. It could not direct that the labor supply at certain mines be transferred to other mines so as to enable those mines to operate equal time. The element of taking mine labor into consideration in determining whether or not discrimination or undue prejudice exists under the interstate commerce act is entirely too remote and speculative to be given any consideration whatsoever.

As above pointed out, the private-car owners are not here seeking any advantage over the mine owners dependent upon system cars in the use of any of the general facilities of the carriers.

Is there anything unreasonable in the practice of according to private-car owners a greater proportion of the carriers facilities than that accorded operators dependent upon system cars when in so doing it is not to deny the operators dependent upon system cars reasonable service? Or, stated differently, if the carrier moves all traffic offered it by the operators both in private and system cars, and it so happens that there is a shortage of system cars, and that the private cars predominate in number, would it be unreasonable to transport all the private cars and system cars, or should the private cars moved not exceed the percentage of system cars placed at the mines and offered for transportation, the balance of the private cars to remain idle? To state the proposition is to answer it.

The act contemplates the furnishing of service and of the facilities by the owner or the shipper of freight. Section 15, paragraph (13).

The Congress has thus recognized the use of the privately owned cars and has limited our power to touch that right to our power over the carriers. We can not declare that right unreasonable or unjustly discriminatory, or unduly prejudicial, or unlawful because of something that is inherent in the nature of that right, because by so doing we would be abrogating a right which the Congress has recognized and which we have stated could only be abrogated by appropriate legislation. If in the exercise of that right preference is accorded to the private-car owners in the use of the carriers' general facilities another question is present. A perusal of our decisions in this question, as well as those of the courts, will show them to be in full accord with this reasoning. There has been no change in the law since those decisions which would warrant us in now holding otherwise.

1591 Upon the further hearing much new evidence was submitted to support the claim of the necessity for the use of private cars by some of our most vital industries.

The private-car owners can be grouped generally into three classes:

(1) Those that own the plants, the mines, and the cars, the latter being used to transport coal from the owned mines to the plants of the owning company. In this class are included the Bethlehem Steel Corporation, the United States Steel Corporation and its subsidiaries, Pittsburgh Plate Glass Company, Youngstown Sheet & Tube Company, Wisconsin Steel and International Harvester Companies, Ford Motor Company, and the Steel Company of Canada.

(2) Those that own the cars and the plants, but not the mines, and which have long-term contracts with specified mines for the entire output of such mines. Included in this class are the by-product coke ovens not connected with the steel and other plants enumerated in class (1), and the Public Service Electric Company.

(3) Those that own the cars and the mines, but w[illegible] are dependent upon outside contracts for the disposition of the coal. In this class may be included the Berwind-White Coal Company and the Westmoreland Coal Company.

The necessity of each class for a regular supply of suitable coal was explained at great length by high officials of corporations represented by each of these groups. Time and space will not permit an elaborate discussion of the vast amount of the very illuminating facts presented by each. I will therefore content myself to briefly point out some of the essential facts which show conclusively the absolute necessity for the steel and by-product coke corporations to secure a regular and adequate supply of suitable coal, which the past has demonstrated can not be secured alone in system cars during periods of car shortage.

The Bethlehem Steel Corporation at the time of the hearing operated over 2,000 by-product coke ovens, which are located at its different plants. These plants produce nearly every class of finished product, including rails, frogs, switches, *roa*lroad cars, structural steel, and ordnance material. These products require the finest grades of steel, particularly with reference to phosphorous and sulphur content. As the use of steel making continues to develop, the necessity for selecting special coals will increase. One of the greatest economic developments in the steel industry during the past 20 years has been the utilization of by-products of coking coal. These by-products can only be utilized at the works, because at the coal mines there are no uses for the gas and other by-products.

The character of its coking qualities and its physical charac-
1592 teristics have to be considered with great care to make the coke from the by-product ovens suitable for immediate use in the blast furnaces. It is necessary, therefore, to select the coal mines which produce suitable coal, and even at best the coal from suitable mines must usually be mixed with coal from other mines to get the desired results. Coke of an inferior quality manifests itself mischievously in a blast furnace on account of what is termed "structure." Not all low-volatile coal offered can be used, because to be suitable it must be of a certain chemical composition and possessing a property commonly called "caking." For the steel industry coke in large lumps is necessary, the size being important on account of the service being required in the furnace, thus narrowing the field from which coal for this purpose can be secured. This property of the coal which results in "caking" is lost by storage. A daily tonnage of coke is required, as blast furnaces are designed and built for continuous operation. Interference with this operation means many ills to the furnaces and their subsequent operation.

This corporation owns 31 coal mines, with an approximate present capacity of 9,500,000 tons per annum. These mines were most carefully selected for the metallurgical and coking qualities of their coal. Of the coal available to it only 15 or 20 per cent is suitable

for coking purposes. Over 300 coal properties were tested with a view to purchasing, and only 5 per cent of them contained coal meeting the physical and chemical requirements to produce coke for steel making. After the selection and purchase of these specific mines it proved impossile, in times of car shortage, to move enough coal from them to the plants to keep the plants in operation. Partial shutdowns with attendant unemployment followed. The result was the purchase of 3,975 private coal cars, which are used solely in transporting coal from the mines to its own plants for its own consumption. No system cars are used at the mines using private cars.

A by-product coking plant is usually made up of one or more blocks or batteries of ovens. All batteries in one plant are of uniform height. Each oven has a system of flues in which gas is burned and the oven is heated through a silica wall from 4 to 6 inches in thickness. The ovens are built of silica brick. It is necessary to heat the oven very gradually as the brick has a very high factor of expansion. One battery of ovens will expand as much as four feet. The expansion joints in the brick work are between every two ovens, which makes it necessary to heat these two ovens carefully and gradually. It takes from six to eight weeks to heat a plant before it can be put in operation. If shut down suddenly it would wreck the brick work and cost from $300,000 to $500,000 for replacement. If the battery has to be cooled off it is put out of
1593 operation for from two to three months. The brick required for these ovens are in specially molded shapes and are not carried in stock, and take four months to make. The essential elements for the successful operation of a by-product coking plant are a continued operation, with a continuous and regular supply of high-grade coal of uniform quality. A continuous operation is necessary because the by-product plants are under contract to furnish daily a fixed amount of gas to the gas companies, which, in turn under their franchises, furnish gas to numerous municipalities, and generally speaking, have no facilities of their own for producing gas. A regular supply of a particular kind of coal is necessary to secure the volume of gas required. The quantity, quality, and b. t. u. content of the gas so furnished must be constant, and must also meet trade requirements.

Not all coal is good gas burning or coke running, due to the volatile content. A sudden change from one coal to another would cause trouble. As indicating the importance of the constant supply of suitable coal, one of the large by-product plants maintains a test plant to determine the kind of coke which can be made from the different grades of coal. Before contracting for coal from 500 to 1,000 tons of coal are run through the plant and the cokes thus produced are furnished to the trade for the purpose of determining whether that particular coke will meet requirements. Coke produced at such by-product plants must be of uniform grade, low in sulphur, and uniform in structure, as it competes with that

received from the beehive coke ovens located at or adjacent to the mines, which always secure a uniform supply of coal. Beehive ovens are crude, simple, and inexpensive; can be started up or shut down without serious injury, and are located close to the mine. They receive their coal continuously from the same mine and therefore produce a uniform product. They are therefore not subject to the transportation difficulties encountered by the by-product ovens. Coke made in by-product ovens is to a large extent supplied to plants operating water-gas machines. This coke must be low in ash, that does not fuse at low temperature. Otherwise the machines will become clinkered and the capacity will be reduced 50 per cent. If the coke is bad the gas company's capacity is cut down and the public is not supplied. The by-product coke industry is vital to the private individual, or the householder because it helps to cheapen domestic gas, which supplies a high-grade domestic fuel that is cheaper than anthracite. It supplies sulphate ammonia which is the best raw material for fertilizer for the farmer, and has increased the output of this fertilizer material over 100 per cent. In 1900 a little over 1,000,000 tons of by-product coke were produced, whereas in 1920 the output was over 28,000,000 tons. Over
1594 $200,000,000 has been invested in the last 10 years in by-product coke plants and their accessories. They are built throughout the country to augment the natural gas which is giving out in various districts. Its use is being extended very rapidly. The basis for the future chemical industry is dependent upon it. The dye industry in this country has grown enormously as a result of the by-product coke operations. The by-product coke industry of this country has made enormous strides in the last few years. The record shows that for every ton of coal coked in a by-product oven there is saved approximately, varying with the kind of coal used, 25 pounds of sulphate of ammonia, 6,000 feet of gas, 10 gallons of tar, and 3 gallons of motor fuel.

The by-product coke operators generally have had unsatisfactory experience in keeping their plants in operation with the kind of coal necessary, particularly during periods of car shortage. To protect against such shortage these private corporations have purchased coal cars and have invested therein several millions of dollars.

The aggressive and destructive attack which the majority report is upon the by-product coking industry, retarding advance in the art of steel making and utilization of coal-tar products, is timely for the nation's rivals. The producers of Germany, and other European countries, are consolidating their position to take control of world markets, including our own, and to meet our growing rivalry. The phenomenal development of the coal-tar industry in this country since the beginning of the World War has been well said to be "one of the romances of American business, and world business as well." The American dye industry is an illustration, but dyes are only one of many coal-tar products. Others include roofing and road ma-

terial, fertilizers, ammonia, benzol, motor benzol, toluol, naptha, benzine, toluene, naphthalene, photographic materials, medicines, perfumes, flavors, and articles too numerous to mention.

The majority report gives this industry the most serious and alarming setback it has ever had. It is the greatest benefit that could be conferred upon our foreign competitors in science and industry. The one thing above all others they would have us do is to abolish the use of the private car. I can see no justification or excuse for the damage done. The private car, without adding a penny to the general burden, increases transportation facilities generally available. Its owners provide for themselves additional cars without which they would be entitled to share in the distribution of all other equipment. It is undeniable that those who oppose their use are benefited by them. To bar them serves only to foster private greed and envy at the expense of public welfare.

1595 I have not attempted to deal exhaustively with the mass of unanswerable testimony placed before us upon further hearing which, seemingly, the majority report utterly ignores. Witnesses Rust, Berwind, Schwab, and other leaders in the industrial arts have made a showing which should have enlightened us. I am unable to comprehend why they failed. They have conclusively demonstrated that the private car is essential to the economical and efficient bunkering of ships and to the carrying on of many of the most important industries in the country. No attempt to answer their testimony was made, and no answer is possible. Some of the most important achievements within the Nation's reach are dependent upon the use of the private car. On questions regarding industries so highly technical and scientific as the making of steel, and many other products, we should accept as basic facts the conclusions of specialists. We have such conclusions by the most eminent authorities in the country. By disregarding them and setting up our own impressions, we incur the censure that arbitrary action, without support in law or fact, denying justice, should bring upon us.

Cox, Commissioner, dissenting:

For reasons already set forth in my former dissenting expression in this case, 80 I. C. C. 520, at page 587, and from consideration of the additional testimony furnished at the further hearing, I am unable to concur in the findings of the majority.

This question is generally recognized as of vital importance, and perhaps no question which has come before the commission in recent years is more closely related to the industrial life of the Nation than this case which deals with the distribution of coal cars. Public utilities, transportation agencies, and other industries which are not only intimately associated with the distribution of heat, light, and power, but with practically all the necessaries of life as well, are all dependent upon a regular and dependable fuel supply. The present efficiency in transportation is largely dependent upon an unfailing

supply of coal. If this supply is reduced, or even restricted, the industrial life of the country is at once affected and the public welfare suffers accordingly. President Coolidge has emphasized the need for the elimination of waste and there is splendid opportunity for cooperation along these lines in the production and distribution of coal. Our position in connection with the competitive markets of the world also emphasizes the need for such cooperation. It is my thought that the use of the assigned car as well as private cars is along the line of efficiency and economy of operation. They both occupy an important place in the field of efficient transportation and their use should be discouraged rather than condemned.

1596 ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23d day of December, A. D. 1924

No. 12530

In re Distribution among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel

It appearing that by order dated March 22, 1921, the commission entered upon an investigation into and concerning the reasonableness and propriety of car-distribution rules, so far as they apply to privately owned coal cars and cars furnished for railway-fuel coal, with a view to prescribing such just and reasonable rules and regulations as might appear to be necessary;

It further appearing that by order entered June 13, 1923, the commission entered its order requiring the respondents to change their practices with regard to the distribution of privately owned coal cars and cars placed for railway-fuel coal so as to comply with the findings of the commission embodied in its report, filed herein, 80 I. C. C. 520;

It further appearing that by order entered on October 5, 1923, the commission reopened the case for further hearing, and pending its report on said further hearing, the effective date of said order entered on June 13, 1923, has been postponed until January 15, 1925;

And it further appearing that said further hearing has been had, and the case submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the order entered in this proceeding on June 13, 1923, be, and the same is hereby, further modified so as to become effective on March 1, 1925, instead of on said January 15, 1925.

It is further ordered that this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

1597–1672 [Omitted in printing.]

1673 In United States District Court

No. 3271, No. 3273, No. 3275, No. 3317

[Titles omitted.]
[File endorsement omitted.]

1674 *Stipulation re evidence and judge's certificate*

Filed Oct. 19, 1926

The complainants and petitioners in each of the foregoing cases and the intervenors on their side having offered in evidence in each case (a) a certified full copy of the transcript of the record of the evidence and proceedings before the commission in the proceeding styled "Assigned Cars for Bituminous Coal Mines—In re Distribution Among Coal Mines of Privately Owned Cars and Cars for Railroad Fuel," Docket No. 12530 on the docket of the commission, as Exhibit 1; (b) certified copies of the 21st (1907), 34th (1920), 35th (1921), 36th (1922), 37th (1923), and 38th (1924) annual reports of the commission to Congress as Exhibits 16, 17, 18, 19, 20, and 21; and (c) certified copies of twelve (12) official reports of the commission as Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15; and each and all of the forvgoing having been received by the court and made a part of the record in each case, the parties, by their respective counsel, for the purpose of reducing the record on appeal pursuant to equity rule No. 75, stipulate:

1. The attached seven (7) volumes of narrative of testimony, numbered I, II, III, IV, V, VI, and VII, respectively, and one (1) volume of narrative of exhibits, numbered VIII, constitute a true and correct transcript in narrative form of all of the testimony and exhibits introduced at the several hearings held by the commission in aforesaid Docket No. 12530 as contained in the certified full copy thereof now on file with the clerk.

2. The clerk shall transmit to the Supreme Court of the United States with the transcripts in all of the cases the attached and foregoing eight (8) volumes of narrative in lieu of the certified full copy now on file, together with the certified copies of the six (6) annual reports of the commission to Congress and the twelve
1675 (12) official reports of the commission with his certification in each case that the same constitute a part of the record on the appeal.

October 11th, 1926.

Barnes, Biddle & Monis, by Francis B. Biddle, solicitors for complainants in No. 3271, Berwind-White Coal Mining Company, Westmoreland Coal Company, New River & Pocahonats Consolidated Coal Company, Pennsylvania Coal & Coke Corporation; Frederic L. Ballard, solicitors for petitioners in No. 3273, Bethlehem Steel Company, Bethlehem Mines Corporation, Bethlehem Steel Corporation; Charles S. Belsterling, solicitor for intervenors in No. 3273, the Illinois Steel Company, Carnegie Steel Company, American Steel and Wire Company, National Tube Company, American Sheet and Tin Plate Company, United States Coal and Coke Company, United States Fuel Company, H. C. Frick Coke Company, United States Steel Corporation; Frederic L. Ballard, solicitor for the Steel Company of Canada, Ltd., the Cleveland-Cliffs Iron Company, Perry Iron Company; Frederic L. Ballard, solicitor for the Youngstown Sheet and Tube Company; Hugh F. Smith, John Lad O'Brian, and Ralph J. Baker, solicitors for complainants in No. 3275, Rainey-Wood Coke Company, Seaboard By-Product Coke Company, Chicago By-Product Coke Company, Donner-Hanna Coke Corporation; Frank Bergen and August G. Gutheim, solicitors for plaintiff in No. 3317, Public Service Electric and Gas Company; Blackburn Esterline, assistant to the Solicitor General; R. Granville Curry, solicitor for Interstate Commerce Commission.

The foregoing stipulation and narrative are approved.

VICTOR B. WOOLLEY,
United States Circuit Judge.
J. W. THOMPSON,
United States District Judge.

OCTOBER 18th, 1926.

1676 In United States District Court

In equity, Nos. 3275, 3273, 3271, and 3317

[Titles omitted.]

Narrative statement of testimoney before the Interstate Commerce Commission

Filed October 19, 1926

1677 JULY 17, 1922.

AUGUST G. GUTHEIM (p. 9), called as a witness for the carriers, having been duly sworn, testified as follows:

Direct examination by Mr. FLETCHER:

(P. 10) As to my experience with reference to the problem of coal-car distribution and the opportunities I have had to familiarize

myself with the subject, I was connected with the Interstate Commerce Commission for a number of years prior to 1917, and in April of that year was assigned by the commission to handle its car shortage investigation, and to work in that capacity in conjunction with the commission on car service of the American Railway Association. I did that through all the rest of the year 1917; and in January, 1918, was loaned by the commission to the Railroad Administration, and formally taken over by it later on in that year, and continued with the administration throughout the period of Federal control. Following Federal control I continued with the American Railway Association in the same capacity, and continued in that capacity down until July 1st, last. In all of that period I was directly concerned in the handling of cars, especially coal cars, and the movement of coal, and concerned also in all of the questions that arose with respect to coal-car distribution, assignment of cars for railroad fuel, and (p. 11) loading. I have been an attorney at law for some years and have been engaged in the private practice of law since the first of July, 1922.

As to whether I have given consideration to the coal-car distribution rules which have been proposed by the American Rail-
1678 road Association in connection with the coal association, and promulgated by the commission in connection with this hearing, I acted as chairman of the railroad commission's committee, who handled that subject in connection with the coal operators, through the National Coal Association. I am familiar in a general way with these proposed rules and with the problems with which they deal.

(P. 13) Exhibit A is a copy of what was presented to the Interstate Commerce Commission by the car service division as the rules agreed upon by the American Railway Association and the National Coal Association, except the assigned car rule which is rule 8 and [the rule as to joint mines] which is rule 4. Exhibit A was thereupon offered and received in evidence as Exhibit No. 1.

(P. 14) These rules were filed with the commission, I believe, in the early fall of 1921 and followed several conferences between representatives of the American Railway Association and the National Coal Association. The final conference was held in Pittsburgh some time in the summer of 1921.

(P. 15) C. S.–31 (revised) constitutes such recommendation of the car service division of the railroads as to uniform mine rating and coal-car distribution rules as would be carried in force by the railroads. They were promulgated in the usual way, and this is the recommendation of the American Railway Association. As far as the car service division is informed, they are generally in effect throughout the country. The point that I want to stress (p. 16) is that the jurisdiction of the car service division in this
connection is the jurisdiction of the American Railway Asso-
1679 ciation, which is recommendatory. I say that, as far as the

car service division is informed, these rules are quite generally in effect on bituminous coal loading railroads.

By Mr. BROWN:

They are in effect by the issuance of circulars by the individual railroads.

By Mr. FLETCHER:

(P. 17) I have a copy of C. S.–31 as it was originally promulgated and also C. S.–31 (revised). C. S.–31 and C. S.–31 (revised) were thereupon offered and received in evidence as Exhibits 2 and 3, respectively.

The rules in C. S.–31 were promulgated September, 1918, to become effective, I believe, October 10, 1918 (p. 18), during the period of Federal control.

C. S.–31 (revised) was put out about December 23, 1919. The notice sent out by the commission which contained the rules as now proposed indicates by appropriate lettering and erasures the changes which have been made by the American Railway Association in conjunction with the Coal Operators Association from the rules in C. S.–31 (revised).

On December 1, 1917, the open-top cars in what was termed eastern territory were pooled. That was done, I believe, in the first instance, by the general eastern operating committee of the carriers at Pittsburgh. The pool took in, in a general way, the cars of what subsequently (p. 19) became the Allegheny and Pocahontas regions. The requirements of the mines for cars and the extent to which those requirements were met was one of the factors that was
1680 taken into consideration in the distribution of the cars out of the pool between the carriers, members of the pool. It was very soon found that there were different bases of the measurement of requirements, and therefore different bases of reports of the extent to which requirements were not met.

The different bases for securing the rating of mines throughout the country are pretty well illustrated in the many reports of the commission on the subject, and they came before us when we considered C. S.–31.

(P. 22) It was because of what I last said that there seemed to be a desirability of uniformity in the rating of mines and the rules governing coal distribution. That was early apparent in 1918, and in June of that year steps were taken to obtain uniformity. That was done by getting together today a committee of railroad transportation men of important coal-producing lines, considering their various rules which they had, as a result of which we agreed upon a uniform basis for both rating and distribution, and that was submitted to the Fuel Administration. They considered it and suggested certain changes, and then suggested that we meet with a committee of the National Coal Association. That we did.

I understand the National Coal Association is an association of operating companies, firms, corporations, and individuals. I be-

lieve it also embodies in its membership the local district associations of such companies, but it is an association of operators
1681 and producers, as distinguished from brokers or retailers. I believe (p. 23) also that its membership embodies from 50 to 60 per cent of the normal bituminous coal production of the entire country. I can not say definitely, but think this association has representation from all the bituminous producing fields.

C. S.–31 applied to tipple mines and only bituminous coal. Practically all of such coal in the country is produced by tipple mines.

Almost immediately after the C. S.–31 rules were adopted the country suffered an influenza epidemic, and the result was that instead of a car shortage we had a car surplus. Before (p. 24) that was over the armistice was signed and the car surplus became accentuated. The result was that the rules were not tried really in 1918 as rules to govern a car shortage. When we got to another car shortage period, which was in the early summer of 1919, there were certain experiences developed which indicated the necessity of some changes in the rules, and the result was that in the summer of 1919 or in the early fall we had some further meetings with the representatives of the National Coal Association, the Fuel Administration being no longer existing, and the result of that was the changes that came out in C. S.–31 (revised). That came out just after the bituminous coal strike of 1919, during which there was an extreme car shortage period, and remained that way all through the next year. The rules in C. S.–31 (revised) were in effect during all the car shortage period of 1921. That is, effective, as I have already said, by recommendation.

Aside from certain changes made by the Interstate Commerce Commission under its emergency powers in respect to as-
1682 signed cars, as long as the coal-car shortage existed, the rules other than the assigned car rules were generally in effect throughout the country, as these rules are embodied in C. S.–31 (revised). (P. 25.) For the purpose of commercial distribution during the coal-car shortage period we have not needed car distribution rules since about January 1, 1921.

Q. (By Commissioner ATCHISON.) They need them today on some lines, don't they?

A. I was about to say that, Mr. Commissioner.

By Mr. FLETCHER:

The purpose of the coal-car distribution rules is to effect just, reasonable, and not unduly discriminatory distribution during times when there s not enough equipment to meet all the demands between all of the coal mines making demand for cars.

By Commissioner ATCHISON:

(P. 26) The changes that are proposed in what the commission has promulgated as an exhibit to its order of investigation were made for the purpose of making the rules applicable in the time of car

surplus as well as in time of car shortage, and automatically slide from one period to the other. That is done by the preamble to the distribution rules.

The existing status is that on all of those roads where all the demand can be met cars are distributed in accordance with the order, and the only thing in such period that usually needs control, that is, the holding of unbilled loads, is controlled by the preamble to the distribution rules.

1683 By Commissioner AITCHISON:

(P. 52) Speaking entirely from memory, I think I figured out, a couple of years ago, in the 1920 period, that the demands for cars on the basis of ratings, that is, for coal loading, ran 16,000,000 to 17,000,000 tons a week, at a time when the capacity of the mines, that is, the potential capacity of the mines, as ascertained from the reports of the operators to the Geological Survey, was about 19,000,000 tons a week. But when we have done the best work we have ever done, arbitrarily giving coal mines all the transportation they could handle, about the best we have done, for two consecutive weeks, was about an average of 13,000,000 tons. (P. 53) The greatest maximum production was in 1918, about 580,000,000 tons. I think the second best was in 1920, about 556,000,000, and in 1917, about 550,000,000.

By Commissioner AITCHISON:

(P. 75) This is a time of car shortage in some places, but even in those cases those railroads are able to get cars which in time of ordinary car shortage they would not be able to get because the car shortage would obtain on other railroads from which they are now obtaining their cars.

By Mr. FLETCHER:

(P. 86) I do not think it is at all practicable to distribute interstate traffic on one system or set of rules and intrastate traffic on another.

By Commissioner LEWIS:

I would say that any system that involved two different bases of rating, two different bases of distribution, would, in the first instance, make it impossible to keep an even balance as between mines, because you have a large number of coal-producing districts where your districts do not run according to State lines and where your car distributor's territory does not run according to State lines. I
1684 fail to see how you could work on one basis in Kentucky, another basis in West Virginia, with respect to intrastate business as to both States, and a third basis with respect to business (p. 87) going to tidewater from West Virginia or going across the Ohio River from West Virginia and Kentucky.

By Mr. FLETCHER:

The Illinois and Indiana fields serve the industrial district of Chicago and are highly competitive in the Chicago market, and that market is partly in Illinois and partly in Indiana. The same situation exists in the St. Louis-East St. Louis industrial territory, both of which get their steam coal out of the neighboring Illinois districts. These instances may be multiplied many times.

By Commissioner ATTCHISON:

(P. 92) I think (p. 93) as a general proposition that the endeavor of most railroads is to equalize, so far as their railroad is concerned, between districts, but in some respects that is an exceedingly difficult matter, and it is not conducive to economy. For instance, taking the Louisville & Nashville as an outstanding example, you have the Birmingham field, which is detached a very considerable distance from its other fields, and the equalization of distribution between their mines in Birmingham and their mines in eastern and southeastern Kentucky may involve them in extremely heavy expense, on account of empty mine [miles]. That may not be any answer, if there should be a failure on the part of the Louisville & Nashville to equalize between districts, but it does indicate some of the disabilities under which many of the railroads suffer.

By Commissioner ATTCHISON:

(P. 95) My understanding of what is proposed is that these railroads desire, in these rules, to keep the distribution even, as between mines in the same district, and, so far as possible, to keep the districts in about the same relation to each other.

1683 By Mr. CURRY:

(P. 170) I think the word "available" is used as describing the aggregate of car supply that is available for that day on the railroad for bituminous-coal loading. You must bear in mind that cars must be made available for other loading, and the railroad's primary duty is to decide which cars are available for bituminous-coal loading.

Q. (By Mr. CURRY.) We discussed this morning, to some extent, the provision "region or district." Now, suppose that the ratings of the mines in district A were 10,000 cars and in district B 10,000 cars. That is, each district had a total of 10,000 cars, whereas the cars available in your (p. 171) first district, district A, were only 5,000 cars and in your second district were 15,000 cars. In your district A, would you apply the shortage provisions of this preamble, or not?

A. I would say that you would call it a car shortage period to district A, and I would say the transportation officer would immediately take steps to get his car supply chassed around from district B for the benefit of district A. It would take some time.

Q. But on that day district B—all the mines in district B—would be allowed to hold their cars under the tipples, wouldn't they, because in district B you have 15,000 cars, and 10,000 rating?

A. You mean they could hold unbilled loads?

Q. Yes.

A. They would never do it in actual practice on any railroad I know of; and, so far as the car-service division is concerned, any day that we find one railroad with a lot of unbilled loads, with other railroads short, we would make it right miserable for the
1686 first railroad, until it got rid of the unbilled loads.

(P. 172) I do not think the requirement that there shall be equalization of cars as before districts is strictly in the rule. That is a duty that is on the carrier and it has got to take care of its legal duty. These rules do not enlarge it or belittle it. This commission may say what the duty is. This commission might well find that it would be highly undesirable in some instances to have an absolute equality between districts located in the matter in which I said this morning. There are some obligations in the law, as you know, besides absolutely even car distribution.

I would say that so far as it can be physically done, and reasonably done, that it is the aim of about all of the railroads to equalize the districts. I think it is the rule and practice on most of them, but it is an exceedingly difficult matter at times to do it with operating economy. So far as I know, it is the rule on the Pennsylvania.

(P. 173) I do not think it is necessary to provide that the reports in rule 4 should show separately assigned cars and unassigned cars. We are attempting here to obtain substantial uniformity of practice. Practices vary on different railroads. Operators are educated to them, and one railroad might put it in this form, and another might not. So long as it gets the information that is required by rule 4, I would not deem it advisable to add a lot of detail to that. There may be some carriers that never use assigned cars. I know that some do not; therefore, they may not choose to litter up their report with this information.

1687 JULY 18, 1922.

By Mr. FLETCHER:

(P. 180) As to policing these rules, my answers were to the effect that the car service division did not customarily police the application and enforcement of C. S. 31 revised. As a continuous and complete proposition of policing, that answer would be correct. I found, upon going back to my office, however, and refreshing my recollection, that on a number of occasions where specific instances of question as to how the rules were applied had been brought up we had sent out our inspectors into different fields, and they had gone into the application (p. 181) of the rules by different carriers in those fields. Sometimes that was done at the request of the carriers; sometimes at the request of the coal operators individually; and

sometimes at the request of Mr. Callahan, of the National Coal Association, and on some occasions Mr. Callahan and I, after the investigation had been made, would arrange for a joint conference of the parties concerned, and finally agreed upon interpretation of what the rule meant and what the practice would be.

Cross-examination by Mr. CURRY:

The purposes of the car service division of the American Railway Association are set forth in what is known as per diem rule 19 of the Code of Per Diem Rules of the American Railway Association. I cannot repeat that per diem rule, but the substance of it is that the car service division is to police the enforcement of car service rules, and under certain circumstances can, by a departure therefrom, arrange for the relocation of equipment between carriers, with due regard to the needs of traffic and ownership.

(P. 182) The car service division had no particular obligation to equalize distribution between districts on any one railroad.

The function was rather to maintain a proper car supply as
1688 between railroads, but I think it is a fair statement that in the operation of the American Railway Association the understanding is that the individual railroad shall run its own property.

The car service division gets numerous regular and periodical reports of the entire car situation of the country.

(P. 183) We have a weekly report of coal loaded, which shows, as I recollect, the cars required, the cars furnished, the cars loaded, and the cars left over, and from that report we furnish to the Geological Survey of the Department of the Interior the information upon which it gets out its Monday morning report of bituminous coal produced throughout the United States. There are other reports of the car service division, of course, with respect to open-top cars and coal cars. Those reports show the car situation only as to entire railroads, not as to divisions or districts.

(P. 202) As to the situation if foreign railway fuel cars were placed at a mine in excess of the mine's rating, I heard that discussed for the first time in the last two (p. 203) days, and the gentleman who discussed it said that there was a difference of practice, but most railroads would commonly place foreign railway fuel cars, assigned at the mine to which assigned, and charge them as placed. Such cars and private cars in excess of a mine's rating would be charged as ordered. I cannot conceive in a time of car shortage that the home cars would be placed to any considerable extent, knowingly, in excess of orders. I am inclined to believe that the same rule should apply, but there is a distinction made in the commission's decision on the assigned cars between the local railway fuel car and the foreign railway fuel car, and I am inclined
1689 to believe that that distinction, as I recollect it, is sufficient to warrant a difference in practice.

(P. 204) If you had a thousand cars available and you had demands, based upon orders, that is, on rating, or on orders, if less than the rating, for 1,500 cars, you would have a factor of 66⅔ per cent upon which to distribute, applying that to your rating, where the rating is the order, or to the order where the order is less than the rating.

(P. 205) In actual practice, not from personal knowledge, but from all that is told to me, it varies a great deal from the theoretical conception of the thing, because of the exigencies of operation. The car distributor does the best he can with what he has to work with and evens up later if he can. I do not know how he does it. (P. 206) I do not know whether the cars are charged after placement. I never was a car distributor and I never worked in a car distributor's office.

(P. 210) I would consider it undesirable to put in a time limit for adjustment of discrepancies under rule 11 unless you put in a very liberal limit, and I answer you that way because I have been told of numerous occasions where, in times of extreme winter weather, it is not only exceedingly difficult to adjust these discrepancies within 24 or 48 or 72 hours, but also to do so would greatly reduce the efficiency of the railroad at a time when it is most needed, and therefore, if there is to be a limit, I would say it should be a liberal limit, and what the liberal limit would be I would rather have an operating man say.

1080 By Examiner Bartel:

I do not believe there ought to be very serious differences in the balance at the end of a car-shortage period. Of course, under the peculiar circumstances that governed in 1920, where by force of circumstances the service orders of the commission had in a way disrupted distribution, as, for instance, the (p. 211) lake order, where we sent cars into a certain territory, you might have some rather pronounced or comparatively pronounced differences in the balance. It seems to me, that under a correct operation you should not ordinarily have those. When you get to the end of that car-shortage period, of course, it is idle to talk about curing the deficiency in the car-surplus period, because everybody has got enough cars, and it does not do any good to cure it that way, and the coal market is entirely different. When you get into the next car-shortage period, you have an entirely different situation again—an entirely different market condition—and perhaps an entirely different condition from the standpoint of the necessities of the country for coal, and the like of that. I would wipe the slate clean.

By Mr. Curry:

(P. 215) As to cumulative overs and shorts at certain mines on the Pennsylvania, this railroad had the heaviest draft made upon it for the coal commandeered, so to speak, by service order No. 10, and the Pennsylvania was not in a happy situation. It had been par-

ticularly hard hit by the strike, that is, the unauthorized switchmen's strikes, and it had to do some very extraordinary things in order to get the lake coal up to the quota. I have in mind that (p. 216) that might be a factor in it. I think also that some of the public utility orders that were authorized under other service orders of the commission, and which I believe were loaded in cars that were not counted against the mine, might also be a factor,
1691 but I merely throw those out by way of suggestion. I would not dare attempt to make any explanation of the situation, at any mine in the country in 1920.

By Mr. FLETCHER:

(P. 218) I should say that these alleged irregularities and discrepancies are a defect in the administration of the rules.

Direct examination by Mr. FLETCHER:

(P. 229) The rules which have particular reference to assigned cars are Rules 8, 9, and 10. Rule 8 really covers the question.

(P. 230) The so-called Traer and Hocking Valley cases were decided by the Interstate Commerce Commission, as I recollect, back in 1906 and 7, and the practice previously, according to the report of the commission in those cases with respect to railway fuel cars, local and foreign and private cars, seems to have been that the mine to which those cars were assigned got them, and then in addition got the commercial rating or distribution of all other cars, based on its total rating. My understanding is that cars furnished for railroad fuel were not counted at all in determining the distributive share of the mine.

Then on January 1, 1906, as I recollect it, the Pennsylvania either put into effect or had in effect what I have heard called "The Pennsylvania Lines West rule," under which the assigned cars were deducted from the rating (p. 231) of the mine, and the commercial rating or distribution was applied to the remainder, as the commercial rating distinguished from the assigned rating. The commission and the court had these two rules under consideration in a number of cases, as a result of which the commission laid down the rule in the Traer and Hocking Valley cases, and the decision there was taken to the Supreme Court of the United States, and the decision
1692 of the Supreme Court was afterwards commented upon by the commission. I think Mr. Commissioner Harlan, in a later distribution case, as holding that the commission's decision in the Traer case was found unobjectionable on either legal or constitutional grounds.

Now, the railroads have always considered that the rule of the Traer and Hocking Valley cases authorized the placement at the mines to which assigned, all the assigned cars.

The different classes of cars which are embraced in the term "assigned cars" are foreign railway fuel cars; local railway fuel cars and private cars. During the war there was a fourth class that

came up, which was the placement of the cars on the order of the Commission on Car Service, as a general rule, at the instance of the War Department, the Navy Department, or the Council of National Defense, before the (p. 232) Fuel Administration was in existence, or at the instance of the Fuel Administration after it came into existence, for the purpose of protecting war needs.

At the time the Traer and Hocking Valley cases were decided there was another case not mentioned in the rules here, that is the Royal Coal Company case.

As a result of the decision of the commission in this case we had authoritative rulings with reference to private cars, foreign fuel cars and system cars for railway fuel purposes. Those rules remained in effect without being particularly disturbed until they were disestablished in June or July, 1918; that is, for a period of about eleven or twelve years.

I think there were always protests by some of the coal operators, but as a rule of car distribution, I think (p. 233) they were generally satisfactory, and the dissatisfaction that broke upon us in the
1633 war period was perhaps due, more than anything, to the utilization of the assigned car rule for the protection of other than railway fuel and private car loading.

Prior to the decision in the Traer and Hocking Valley cases, except under the Pennsylvania rule that I have discussed, assigned cars were not counted against the mine at which placed, at all. The mine got everything that it was entitled to, as though there had been no assigned cars. Subsequently the railroads continued to place assigned cars, but they were counted; and, if in the count, the assigned cars equalled or exceeded the distribution share to which the mine was entitled, no additional cars would be placed. If they did not equal the share to which the mine was entitled, enough additional commercial cars were placed to bring the placement up to the pro rata share of distribution.

By Examiner BARTEL:

(P. 234) The rule was authorized to apply to both foreign cars and local cars. I think it applied generally as to foreign cars. The practice varied and I would gather from the reports of the commission and what I have heard otherwise of the history of the matter, with respect to the system cars, also.

By Mr. FLETCHER:

Generally speaking, under the operation of the Traer and Hocking Valley rule those three classes of cars were treated the same. The decisions in those cases and the Hillsdale case and a few others, are all explicit on this point, that the assigned or consigned cars must be placed in accordance with the assignment or consignment, even though they exceed the distributive share.

(P. 235) You must bear in mind that the assigned car rule has practically no effect one way or the other, except in the period of

a car shortage, and until we reached the war period the coal car shortage in this country did not exist ordinarily more than 10 per cent of the time, and then it seldom existed as a nation-wide proposition.

1694 We have always had periodical coal-car shortages in different sections of the country, usually seasonal. As we had I think an almost continuous car surplus period for a number of years after the Traer and Hocking Valley cases, we did not have very much occasion for the utilization of the rule in its entirety, and used it only in part at the periods. We did have a car shortage period I believe in the business boom that ended in 1913 or early in 1914. We were in a business depression which continued for some time after the European war began, and when we got into the war an extraordinary demand for coal did not come until along about in 1916. Then the commission began its car shortage investigation That ran through the winter of 1916-17. We entered the war in April, 1917. When I took hold of the car service work in April, 1917, I think that about 75 per cent of all of the troubles that came to Washington and affecting railroads, outside of labor, were on coal. It was not so much a matter of production of coal as it was the distribution of coal, because (p. 236) when 1917 was over we had produced about 520,000,000 tons of coal, something we had never done before, and, based upon war experience as we now know it, that probably was sufficient, except that it was not distributed as it might have been. But, one result of the war was the continued insistence, brought to the commission, brought to the railroads, brought to the Council of National Defense, that certain concerns had to have coal. Some times they had bought it and some times not. The constant battle in the Commission on Car Service was to avoid the arbitrary placement of cars assigned for the loading of coal, for particular concerns. The Commission on Car Service was not always able to resist the insistence especially when it would come from the coal production committee of the Council of National Defense, or the Navy Department or the War Department, and when the Fuel Administration came into existence, about the latter

1695 part of 1917, it had very little control over coal distribution, and for the first six months of its existence much that it did was affected through control of transportation, by insisting that the Commission on Car Service should assign cars to protect particular loading. That came to such a pass on the Pennsylvania (p. 237) Railroad that there was finally no more commercial distribution at all. Everything was assigned.

On January 1, 1918, when Fuel Administrator Storrow of New England came to Washington and said that New England would have to have 500 cars of coal every day, he refused to accept the order of the Fuel Administrator, stating that nothing less than an order from the Director General of Railroads assigning cars for this loading, would get the coal. The Commission on Car Service, which was still functioning, finally issued such an order.

That in a general way, will indicate what the situation was when the agitation began for the discontinuance of what it came to be called "the abuse of the assigned car."

The railroad fuel usually amounts to 27 or 28 per cent of the bituminous coal production of the country, and if it were all purchased on output contracts, which is by no means the fact, and if the cars were always assigned for output contracts, which always is not the fact, the ultimate result in the case of a 50 per cent distribution, continued throughout the entire car shortage period, would only affect in the aggregate, 14 per cent of production of the coal; but it was the loading on the commissions' assigned car rule of commercial coal demand for war purposes that created the difficulty.

(P. 238) I am getting now down to the period when the agitation began to abolish the assigned car—early in 1918.

1696 The Fuel Administration got on its feet, so to speak, in the matter of distributing coal, early in 1918. At that time transportation was in a woeful shape. As soon as the Fuel Administration got to the point where it could see its way clear to issue an order for coal distribution with some fair satisfaction of feeling that it would be obeyed, which was not the case previously, they started an agitation for the abolishment of the assigned car. At that time coal car distribution was away down. For the reasons that it was stated it was almost zero on some railroads. The situation was accentuated by the weather.

The Fuel Administration brought its plea to the Railroad Administration. The Railroad Administration took the position that under no circumstances could the assignment of cars for railroad fuel be abolished, unless there was, simultaneously, a guarantee that the railroads would have (p. 239) an ample supply of coal of the proper quality, at the right place. The discussion went along and the two administrations could not get together, and they finally took it to the President. The President directed the even distribution of all cars and simultaneously the Government price of coal in all cases be cut 10 cents a ton. The cut was made immediately effective, and steps were at once undertaken to set up the organization in the Fuel Administration to take care of the railroad fuel requirements. When that arrangement was consummated, the assigned cars were abolished by direction of the Car Service Division issued in the case of a few Eastern roads in late June, 1918, and generally in early July, 1918.

The private car status was not affected at all. It was taken for granted that the President had not intended to confiscate the right of the private car owner in his equipment, and the private car went along as it always had. In the next place, the Railroad

1697 Administration reserved the right, if there was a fall down by the Fuel Administration on furnishing coal, to come in and get that coal by assigned cars, and when (p. 240) the uniform

mine rating and the coal car distribution rules, C. S.–31, were made effective, the rule was couched in language that would permit that. That rule was also framed in that language to take care of any fall down by the Fuel Administration with respect to other coal vitally necessary in the war program. C. S.–31 defined "assigned cars" as private cars and cars which were especially assigned by orders of the Railroad Administration. All other cars were classified as unassigned cars.

Now, the thing to be noted with respect to the abolishment of the assigned car is that when it was abolished in late June or early July, 1918, we were no longer in a car shortage period of any consequence. The reports of the Geological Survey, weekly, from that time on will show, that with perhaps not more than one or two exceptions, the time reported by the operators as lost on account of transportation disability, did not exceed 10 per cent and usually it was in the neighborhood of 5 per cent; so that if the situation had gone along exactly as it had been going, the improved transportation condition would have cared for it without any further (p. 241) assignment of the cars to an extent that would have disrupted commercial distribution.

Then in October, 1918, there came the influenza epidemic which practically created a car surplus. Then the armistice, and then the business depression, and then the Fuel Administration went out of existence.

1695 At the time the assigned-car rule was amended so as to limit the assigned cars to private cars, and cars especially assigned by the Railroad Administration, the price of fuel to the railroads was fixed by an order of the Fuel Administrator, and there were assurances by the Fuel Administration and by the Railroad Administration that an adequate supply of coal would be furnished to the railroads so as to permit their economical and efficient operation. That not only is so, but despite the fact that a 10-cent cut was made in the cost price, assigned cars were not abolished for pretty nearly a month, due to the fact that the Fuel Administration did not organize to get the thing going so that the railroads would be protected.

The point to be observed is that from 1886 and 7 you had this protection for railroad fuel, and this protection (p. 242) was not taken away from the railroad fuel until something in the way of Government authority was set up in its stead.

Now, the Fuel Administration discontinued operation along about February 1, 1919, and we were in a car-surplus period, and in the next summer we got into a car-shortage period. We had no Fuel Administration, no organization of the Fuel Administration to get the railroads their coal, and we had no assigned cars, because Mr. Hines did not deem it advisable to go back to the President and ask him to rescind his order. So, almost immediately with the development of the car-shortage period, numerous railroads found themselves with two or three or four days' supply of fuel, and in a dan-

gerous situation, and we were asked in Washington what to do. I ruled that any railroad that had a contract for fuel, and could not assign cars, and the contract was not being carried out, should confiscate the coal at the tipple before it was commercially
1699 billed, and I think the railroads relations committee of the National Coal Association came up and went over the situation with us, and we continued that practice. Mr. Hines, I believe, stated that it was the only thing to do. We went along that way until the central coal committee began to function in the strike of 1919. It functioned under the reestablished order of priority (p. 243) of shipment that was rehabilitated by Dr. Garfield, which placed railroad fuel, I believe, on the first order of preference. That again took care of the situation, and I continued while the central coal committee continued to operate, and when it went out of existence on March 1, 1920, I think it was, the same difficulties arose. The matter came before the commission and Mr. Chairman Clark suggested that the operators and the railroads should attempt to iron it out without any action of the commission. So we went up to Pittsburgh and we talked for two days and reached no concrete result. We came back and so reported to Chairman Clark, and the commission just previously having issued its notice of March 2, 1920, recommending that C. S. 31 (revised) remain in effect.

Within a few days after that report, where we reported no progress to Commissioner Clark, the (p. 244) commission issued an emergency order of April 15, 1920, reinstating the rule of the Traer and Hocking Valley cases.

Shortly after the issue by the commission of the order of April 15, 1920, there were various informal and formal proceedings, that came before the commission with respect to it, and the National Coal Association—I think this is a fair statement—operating through the agency of the Lambert Run Coal Company, attacked the practice of the carriers, in the State courts of West Virginia, and attacked the practice under the commission's order of April 15, 1920, but without in any way referring to the order. In progress of that case it was removed to the Federal courts, and an injunction
1700 against the practice of the Baltimore & Ohio, which was the defendant, was issued in the United States District Court of West Virginia, and the action of that court was reversed in the circuit court of appeals in the fourth circuit. An appeal was taken from that decision by the Lambert Run Coal Company of the Supreme Court of the United States decided the case favorably to the carriers. During that time and since (p. 245) we have been in a car surplus period.

The order of April 15, 1920, remained in effect until, I believe, it was October 1, 1920, when it was superseded by service order 18, which as I interpret it, applied the rule of the Traer and Hocking Valley cases, but limited its enforcement to the assignment of cars for railroad fuel loading only where the coal was contracted for for

a period of six consecutive months, for the entire output of the mine. Service order 18 was canceled I think, in April, 1921, and contemporaneously an order of investigation in docket 12530, now under hearing, was made. At the time the order was canceled there was a car surplus which, generally speaking, has continued until the present time.

(P. 246.) The Lambert Run case was decided by the Supreme Court of the United States upon a jurisdictional question. It does not interpret squarely paragraph 12, section 1.

There is the case of the Corona Coal Company against the Southern Railway Company, decided in favor of the railway in one of the United States district courts in Alabama, now pending on appeal in the United States Supreme Court.

I believe the Southern Railway Company thinks that the merit of the statute is really in question now.

By Commissioner ATCHISON:

It is really in question and is before the court. At the present time the question is moot as far as the period when it was first started is concerned, but not moot as far as what faces us
1701 perhaps (p. 247) in the next two or three months.

Q. (By Mr. FLETCHER.) Is it an unusual thing for the railroads of the United States to own coal mines either directly, or through the medium of a holding corporation?

A. No, sir; we have endeavored to get some complete record of such ownership, and I hope before this hearing closes that we can put something in this record on that point. It has not all been compiled, and with other information which we have endeavored to secure, is a rather large order, and has not all been gotten together.

(P. 248.) Some of the railroads own them outright. There are some, I believe, that lease and operate mines. The Illinois Central, the Norfolk & Western, the Chesapeake & Ohio, and the Burlington, I believe, all own bituminous mines. I think the Lehigh Valley and the Lackawanna lease a lot of mines. Some of these roads own the mines outright and some, through the medium of a holding company, depending upon the character of charter power that they have. We have asked a question in the questionnaire sent out, designed to bring out the fact whether in case the railroads own coal mines those mines are in the commercial business, and my recollection is, as far as I have seen the replies, that there is very little of the coal that comes from the mines owned or controlled by the railroads that is in the commercial market.

(P. 249.) A great many of the railroads of the United States and Canada do not have any coal mines located on their rails. The custom, in accordance with the rule of the Traer and Hocking Valley cases, has been for those lines to contract for their coal, and either in contract or otherwise, to arrange to send cars of
1702 their ownership, by assignment or consignment to the mine on the foreign road, and that assignment or consignment is

then protected and the cars are placed for the loading of the railroad fuel on that contract.

Certain railroads own mines located on the rails of other railroads. The Grand Trunk for instance, I believe, owns the Rail & River Coal Company in the No. 8 district at Bellair, Ohio, and sends thousands of cars from Canada into the United States yearly for the loading of that coal. The Canadian Pacific, I understand, likewise owns some mines or leases some mines in the United States. The Soo Line, I believe, has an interest in or controls and owns directly a company in Ohio.

(P. 250) Q. (By Commissioner AITCHISON.) Incidentally the Soo Line opposes the assigned car rule, doesn't it?

A. They came to us and asked for the assignment of cars when the rule was not in effect. I never heard that they took that position that you state, Mr. Commissioner. It is news to me. The Delaware, Lackawanna & Western and the Lehigh, as I have already stated, lease and operate mines on their roads; bituminous mines.

By Mr. FLETCHER:

A number of these railroads that do not serve coal operations with their own rails have equipped themselves with coal cars for the purpose of securing their own fuel supply. The Pere Marquette has gone into the market and bought cars for the purpose of keeping them in its own fuel coal movement. The Grand Tunk has done the same thing. The New England railroads have no coal loading, except some tidewater coal, but they have bought cars for the purpose of protecting their railroad fuel beyond the needs of their tidewater coal movement and production. As a general rule they are
1703 kept in that trade. For instance, the Pere Marquette say that they continuously keep those cars moving on railway fuel. (P. 251) I believe that is authorized by the commission's rule in the Hocking Valley case, 12 I. C. C. 398; the Traer case 13 I. C. C. 451, and the Royal Coal & Coke Company case, 13 I. C. C. 440. Those are the three that are usually cited as companion cases on this general subject.

By Mr. FLETCHER:

(P. 252) The private coal car, after the decisions of the commission in the Traer and Hocking Valley and Royal Coal & Coke Company cases, became less and less a factor. That was due to the decision of the commission, quite naturally, because thereunder the private car owner did not get other cars over and above his private cars, based on his entire commercial rating. The number of private coal cars then decreased for some years, and I think when the stress for coal began in 1916—I make this statement without having checked the figures—it was probably at its minimum, compared with what it had been prior to the Traer and Hocking Valley cases. Since that time, and especially following the war, following the discontinuance of the fuel distribution by the Fuel Administration, there

has been a renewed tendency by the coal producers and I think to a greater extent by the coal consumers, to purchase private cars.

By Commissioner AITCHISON:

That is especially true of the public utilities. Many of them have considered very seriously buying private cars. (P. 253) Some of them have bought. The Public Service Corporation of New Jersey, I believe, owns 600.

Q. (By Mr. Brown.) Isn't it true that there are less private cars today than there were in 1917? That is, percentage of the whole?

1704 A. [It] may be a percentage of the whole, Mr. Brown, but I know a large number of concerns that have bought private coal cars since 1917. That is particularly so of the public utilities and the steel corporations, especially those who operate by-product coke plants, where the continuous operation and continuous coal supply is highly desirable.

By Mr. FLETCHER:

I do not know how many private coal cars are in use but can get that information out of the equipment register right shortly. Private cars are not limited to railroad fuel but can, under the rules, be placed for owner's (p. 254) loading either at his mines or at mines where he purchases coal. Generally speaking, the rule is, more than the exception, that private cars are used for other purposes rather than railroad company fuel.

When the railroads were prohibited from assigning cars for their fuel there was an agency of the Government in the shape of the Fuel Administration which had, in a conference with the President, guaranteed the Railroad Administration an ample, adequate supply of the [coal]. When the Fuel Administration quit, and thereafter we got into the next car shortage period, we had no assigned cars by virtue of the President's order, and we had no Fuel Administration to function. The result was what I have already described, the practice of the railroads, with the approval of the administration at Washington, of confiscating at the tipple before commercial billing, the coal of mines who had contract obligations to the railroads, and did not fulfill them. Second there was the resort to confiscation en route, and that of course of necessity had to be relied upon by the non-coal producing (p. 255) railroads. Some of these non-coal producing railroads do not carry enough coal in the course of a year, if it were all confiscated, to keep them running with

1705 railroad fuel. The Norfolk Southern and the Seaboard Air Line are examples of that type of railroad.

I think the confiscation of coal is the worst possible way in which a railroad can get coal, far worse than the rule even that the commission condemned in 1906 and 7. It upsets the coal market; it takes coal away from people who have bought it, and who expected to have it, and who are thereby driven to the spot market, always

an undesirable thing in times of car shortage. It gives the railroad the wrong kind of coal in many cases. It makes it take a higher quality of coal in some cases than it ought to take. It results in the very undesirable thing of taking coal at times from public utilities. It has resulted in one case that I know of where the consignees of the coal which were located on another railroad, have retaliated against the railroad's confiscating the coal, by refusing to route shipments over it.

(P. 256) Confiscation is entirely uneconomical both from the standpoint of price of the coal and the quality of the coal. In many cases it subjects the railroad to the payment of special damages and I believe that the recent decisions have been more severe on the railroads than was the case in the previous decisions.

By Commissioner ATCHISON:

In one case, I believe in Alabama, the court which granted the injunction said that the railroads did not have to confiscate because they could assign cars. Simultaneously an attempt was being made to enjoin the railroads from assigning cars.

By Mr. FLETCHER:

That was in an adjoining State, Georgia. I believe there is a statute in Iowa which prohibits confiscation of coal, and I understand that some have been proposed in other States.

(P. 257) If assigned cars are not permitted the only alternative to confiscation, which a railroad has, either because it has not been able to contract or because the shipments are not made on con-
1706 tract, is to go out into the spot market. In 1920, when the Chesapeake & Ohio sent out invitations for bids to all of its operators, I understood they got favorable offers to sell coal at some price from three of them. The Norfolk & Western had a somewhat similar experience. There are many of the railroads that reported somewhat similar situations, but I suppose a good many of them ought to be tempered by the fact that they could always get the coal if they paid the price, the spot price.

(P. 258) Going into the spot market for any large per cent of the 28 per cent of the bituminous coal production of this country which the railroads consume, is bound to have an undesirable effect, from the standpoint of the country as a whole, on the spot market. It does not give the railroad a dependable and reliable supply of coal. If the practice of assigning cars for railroad fuel were abolished, I do not see where it would add one car. I can see where it might deduct cars. As to a railroad assigning its own cars off its line for a supply of coal, if it did not send its cars to the foreign line it would thereby diminish of course the number of cars available for distribution on that line. I take it that that might continue for awhile until, if the railroads know definitely they cannot assign cars, the non-coal loading railroads will probably endeavor to rid themselves of their coal carrying cars.

(P. 259) Q. And the effect would be to double the supply of coal cars on the road which was supplying the coal?

A. For the time being I would say that that probably would be the result.

1707 (P. 261) The generally accepted view of the operating and transportation men is that the assigned car is highly conducive to economy. In the first place, it guarantees a regular and adequate supply of the proper kind of fuel, and with that protection before the railroad, a railroad can afford to get along with fewer cars of coal on hand for railroad fuel purposes. That means that the cars thereby released from the (p. 262) stock account can be put into commercial transportation. In the second place, if you did not have assigned cars, and the railroad was to try to protect itself, it would either have to over-buy to a material extent, so as to take care of possible deficiencies in shipment to it during times of car shortage, or else it would have to distribute its purchase over a much larger number of mines. The purchase of the coal at a much larger number of mines would mean less transportation economy in assembling and handling that coal to the destinations where it would be needed, and that, again, would make for an uneconomic transportation operation. Then, there is the additional element of policing the quality of the coal, when it is bought from a much larger number of mines, and the fact that the policing probably cannot be as good, and there is the further fact that in some cases the coal purchased at a large number of mines if not considered fit, for one reason or another for railroad fuel purposes, especially for use in high grade railroad service. By "economy" I mean economy of operation.

(P. 263) I think you could actually move more coal than you could without the system of assigned cars. I think that is a
1708 good justification for it [the system of assigned cars]. As to storing coal I have never been able to see why the railroads should be expected to store coal to any greater extent than does the commercial user, and I think that, as a general proposition, the coal stocks in the country, when they are surveyed, show that there is more or less similarity, a substantial similarity, in the commercial and railroad fuel stocks.

By Commissioner ATTCHISON:

If you take the public utilities storage piles, you will find that where the Boston Elevated will have a three months' supply of coal, along about mid-November, you will find the Boston & Maine and New Haven will customarily (p. 264) have about the same. What I mean is that usually the experience of the different consumers in the different sections of the country indicates what they need for protection, and they all about run to the same extent. Now, if you were to go into further storage for the railroads, you will have the question, first, of whether you will store it at destination, with the operation of moving it from the storage pile to the different points of consumption, or whether you will store it en route, and in either event

there will be a secondary handling, and a secondary movement from your distribution centers, with four terminal services instead of two terminal services, of course, involving relatively longer time in the use of the car.

By Mr. FLETCHER:

There would be the problem whether the cars could be assigned preferentially for the socalled second handling.

By Commissioner AITCHISON:

I anticipate that these coal operators who object to assigned cars at the mines would find the same (p. 265) reason for objecting to assigning cars at storage piles.

Q. [By Commissioner Aitchison.] They certainly do not have the same statutory warrant, because the statutory warrant only relates to mines?

1709 A. That is correct; but, if it is a question of statute, I anticipate they would take steps to get the statute changed, if I understand their attitude.

As to the extent to which the carriers of the country have resorted to the assigned car rule, we have endeavored to get that information by the questionnaire to which I referred this morning, and the information reported in answer to those questionnaires has not yet been completely summarized. It will be before this hearing is concluded.

By Mr. FLETCHER:

(P. 266) I want to refer to the question of proper grade and quality. In 1917, shortly after the Fuel Administration began to function, it became necessary to take some steps to protect the railroads, especially in the eastern part of the country, in the matter of locomotive fuel supply. That was done through a requisition order issued by the fuel administrator. The requisition order requisitioned the needs of the railroad from all of the mines on the railroad, and to the extent that any mine, by virtue of contract, was already shipping more than what it would be obligated to under the requisition based on rating, it was expected to continue the excess shipments, and the requisitioned amount from the other mines was correspondingly reduced by a re-figured percentage. That was done on the Pennsylvania, the Baltimore & Ohio, the Norfolk & Western, the Southern, and a number of other railroads. From the standpoint of service, so far as was reported to the commission on car service and to the car service section—for these orders continued in effect, some of them, through several months of 1918—the result was highly detrimental. It involved the taking of coal from practically every mine, it involved the taking of coal from some mines from which superintendents of motive power said the railroad would never (p. 267) even think of taking coal, and the result was that service

1710 was bad. I think Mr. McAuliffe, who had charge of that matter for the administration, can tell some very concrete instances with respect to that particular subject. To avoid that, you

should give the railroad reasonable leeway as to where it shall purchase its coal, and give it the right of policing grade and quality, which it does not have on such a requisition process.

I stated this morning that during the time of the central coal committee, the railroads received their coal on a priority of this distribution order. The record is that notwithstanding that contention, it was impossible in many cases to get all the coal that was needed, and, in consequence, there was a great deal of confiscation. I think also it might be stressed that throughout the period in which I have had any connection with this subject, whenever we did not have assigned cars, or some Government priority in shipment, to the railroad, the railroads were in distress. I do not know of anything that will compel a coal operator to ship preferentially on a railroad contract. If he makes a contract to ship preferentially I do not know whether you can obtain an order of specific enforcement of that contract, but, however that all may be, whenever we had neither assigned cars nor priority of shipment, we invariably had more or less distress in the matter of railroad fuel.

I would also like to suggest what may perhaps be more (p. 268) properly a matter for brief and argument, that the carriers contend that certainly as to the coal which they produce on their own or controlled lines, and ship solely for railroad fuel use, they are operating a self-contained matter, and are not common carriers as to that particular coal, and seemingly there seems to be some ground in the commodities clause for that view.

1711 By Commissioner ATTCHISON:

As to cars sent in by foreign lines, there is a common-carrier service of the originating railroad, on which the mine is located, owned by a foreign line.

Taking railroad fuel coal as 28 per cent of the country's production, if you purchase it all at full-output mines, and you had a continuous 50 per cent car supply, in a car-shortage period of some length, you would then really affect only 14 per cent of the production. But, if you will take the reports of the Geological Survey covering the reports (p. 269) made by the mines of time worked and lost, and the causes of the time lost, you will find that in times of good market, as well as in times of poor market, although it is accentuated in the latter case, that the differences in working time between neighboring districts and between neighboring mines in the same district, even when there is an absolutely full-car supply, are far greater than any differences that you can get on account of the assigned car.

By Mr. FLETCHER:

I think I have observed some cases where you will have some districts working 16 per cent of full time and neighboring districts working 60 per cent of full time, and the same is true of mines within the same district. As to whether, from a practical viewpoint, it is possible to operate the roads in times of acute car

shortage without the use of assigned cars. I do not think it has proven a satisfactory way in the last few years that I have been connected with the subject.

(P. 270) I think there is far less undesirable disruption of the coal situation with assigned cars, taking it as a whole, than there would be as a result of the use of no assigned cars. I mean for railroad-fuel purposes.

By Commissioner AITCHISON:

(P. 271) I think that under the commission's rule in the
1712 three cases we have referred to, that the railroad was really justified in computing each day as a law unto itself, and I have always personally considered that the commission's decisions in the Traer & Hocking Valley and Royal Coal & Coke Company cases were weak in that respect. I have felt that it would have been far better if the commission had made a definite finding with respect to what the period of computation should be, in order to avoid putting a mine on an arbitrary car supply, with assigned cars on one day, and leaving it without penalty to go on a commercial distribution the next day. I have never thought that that was a fair proposition, but the decision of the commission, as I recollect it, speaks of the period of computation as a day. Now, I have some faint recollection that in the answer to the Harding resolution the commission used language that rather tends to clear up that difficulty; but even so it is not as clear as it might be, in my opinion. Service Order No. 18 cleared it up, but under the code of rules now before us (p. 272) that is left uncertain.

Cross-examination by Mr. BALLARD:

As I understand rules 8, 9, and 10, there is no limitation based on the taking of the output of the mine, either for one day, or one month, or six months, or a year, and if a mine that was rated at 100 cars a day received a railroad order for 60 cars of coal, and there was a 50 per cent car supply, and the mine had no other contracts with the railroad, it would get 60 cars.

(P. 273) Under these proposed rules the mine is the unit of calculation.

By Commissioner AITCHISON:

The calculation is on a single mine.

By Mr. BALLARD:

Under the "round-robin" system—that is, by agreement of
1713 the operators in the district—cars could be pooled and furnished so as to get the full working time on successive days for different mines.

(P. 274) As to preserving the identity of foreign railway fuel cars I think that with cars located in the country as they are to-day, the railroads would probably go back to protecting the individual

cars and the billing to the individual mine. In 1920, when car ownership was scattered everywhere, it was pointed out to Mr. Commissioner Clark that you could not protect an assignment with cars of the ownership of the railroad purchasing the coal. I believe he made the comment that he did not think the marks on the side of the car were controlling in that situation, and therefore the assignment was not at that time strictly of cars of the ownership of the purchasing railroad. I rather lean to the opinion that the preservation of the identity of those cars would be required under the proposed rules. I would not be surprised if the practice may have varied at times on some railroads, because, as a matter of operating convenience and economy, that comes in there very materially.

(P. 275) I do not know how many railroads in the country own coal mines either directly or indirectly. We are compiling that information. [Request by Mr. Ballard for information with respect to the Seaboard Air Line and the Norfolk Southern.]

By Mr. LAVERTY:

The question of assigned cars becomes a matter of importance only in periods of car shortage. I have heard it stated that, taking the country as a whole (p. 276) over a period of ten years, you would not have a coal-car shortage 10 per cent of the time, and then it would not be a nation-wide shortage. It would be seasonal and local.

As to what railroads are particularly afflicted, that is pretty 1714 hard to say, when you talk about seasonal and local car shortages. Out in Colorado you will have a coal-car shortage almost every year in September, because your coal out there is a domestic proposition, and your householder begins to buy then.

As to the performance of individual railroads and the history of those matters, we can show, for, I believe, about five years past, a record of the cars required, furnished, and loaded by each of the bituminous coal-loading roads of the country, and that will show the extent to which there was a shortage at any time. That, perhaps, will be the best way of answering the question. If you want a guess on it, I would say that whenever you have a coal-car shortage—a bituminous shortage in the east—all of (p. 277) the coal-loading railroads in the east are affected, some more than others.

(P. 278) As to whether certain railroads east of Pittsburgh are not bothered by car shortage in their coal business, I would say that is not correct. The shortage is acute on some roads, and less acute on others, and some roads compared with others are very favorably placed, by ownership and other reasons. I would not admit that there was a road in the east that had no shortage at all when there was a general coal-car shortage. If you will let me produce the figures that I mentioned a moment ago, I will stand by what the figures show.

As to whether great vices in practice have grown out of the assignment of coal cars, the answer is "No." I would not term great vices or the like of that. (P. 279) I do not know that railroads

assigning cars for their fuel supply assign them in such large numbers that for weeks at a time there is a surplus of idle cars at their mines which could be put into operation for commercial purposes. I will say that there have been sometimes when it has been said that there were surplus cars at certain mines, and we have had
1715 it checked up, and where we found instances of that sort, we have corrected it. That was done in the Eastern Railroads Car Pool during the Federal administration.

As to whether placement of assigned cars is without regard to the rating of a particular mine on a particular day, my answer is "No."

As to whether 200 assigned cars might go into a mine having a rating of 100 cars on a particular day, I don't know that. As to whether 101 might go in, I never was a car distributor and never worked in a car distributor's office, and I never saw any detailed reports that (p. 280) would show that information. I have no information on the subject at all.

By Commissioner Aitchison:

I can not say that I know whether the carriers ever have, in any case, placed more cars under the assigned cars [rule] than the mine rating.

I assume that the placement of 101 cars in the case of a mine with the rating of 100 might happen.

By Mr. Lavergne:

(P. 281) I would say that under the rules, where we are taking the rating at the mine, and that is in excess of the commercial rate of distribution, they count the cars, and they disregard the cars in excess of the commercial rate of distribution under the assigned-car rule. I do not see that a particular operator who is favored with the assigned cars to excess has a great commercial advantage. I do not see where he gets any other advantage than what the rule gives him, which is the excess above the commercial rate of distribution for the day. As to whether the favored operator should be charged with this excess from day to day so that he would not share nor participate in the unassigned cars on days when he did not have assigned cars up to his rating (p. 282), I have already indicated what I think is the weakness of the rule of the Trace & Hocking cases. If that weakness is corrected, it will take care of the situation that you refer to. [Mr. Fletcher states this is not
1716 the view of the railroads of the country as a whole.]

(P. 283) Assigned cars include cars of private ownership. I know that large numbers of private cars are consigned from day to day to the mines of the owners of those cars in excess of the ratings of those mines. The rule says that all cars of private ownership placed for the owner's loading will be considered. I think the word is, ordered as placed.

(P. 284) I would say that in the case of your private car, you have a car that must undoubtedly go to that operation, and that he

is entitled to those cars under the commission's decision, in any number in excess of the commercial distribution for that day. There is no provision in rules 8, 9, or 10 for charging such a coal operator with the overages.

I know that owners of private cars buy coal from other operators and send their own cars for that coal, and that is provided for in the rules, which refer to private cars placed for the owner's loading, and not placed at the owner's mine. (P. 285) Those cars would be charged against the operator who actually loads them on the assigned car basis. That will continue to be the practice if these rules now proposed go into effect.

As to how the eliminations referred to in rule 9 are brought about in practice to make a new basis for a revised percentage, those eliminations, as I understand it, are the eliminations of both the rating from the aggregate rating of the carrier and the cars placed at the mine and the aggregate number of cars available, so as to arrive at a new basis for figuring a second percentage for making distribution of the unassigned cars. (P. 286) The elimination removes the mine that is receiving its full share or more than its full share of assigned cars, and my understanding is the residue
1717 is apportioned among the commercial mines and other mines receiving assigned cars, where they have not yet received up to their full rating. I have not worked that out in practice. That rule is framed very largely in the language of the Traer & Hocking Valley cases.

As to reframing the rules so as to make it entirely certain what this process of elimination means, I regard it as entirely certain. There has not been any difficulty about it in my mind. You might get some of these practical men and see how it strikes them, the men who work out the percentages.

(P. 287) As to whether there are great inequalities arising in the coal regions and the coal districts as the result of this assigned car rule, there are some inequalities; I think I would not term them great. I do not know that large elements of the population are put to long periods of intermittent employment as the result of it. I can see where it might make a difference in the working time of the mine. As to whether operation of this rule means that in the autumn, 1922, the public, who must buy commercial coal out (p. 288) of system cars, is going to be very badly hurt, my answer is "No."

If the public does pay a little bit more for commercial coal by virtue of assigned cars than by virtue of unassigned cars, they will pay more for transportation because the railroads will pay far more for coal. The public consumes 72 per cent of the coal.

By Mr. BOYLE:

(P. 289) Concerning car shortages and coal shortages, just at the present time you have in this country a coal shortage, which is not the result of a car shortage. When your miners are working, if you have a coal shortage, usually it follows a car shortage, or a car short-

age follows it. Now, at the moment, your assigned car, during a period of coal shortage, is not a factor, except upon those few
1718 railroads which are producing coal, and which get more than the number of cars they would ordinarily be getting, because other railroads are not using their coal cars in full. Because of that last fact, with a coal shortage in the country, you may not have a car shortage on the railroads that are loading coal, and therefore you my have a coal shortage period, and still your assigned cars would not affect the commercial situation, because you have plenty of cars to go around.

By Mr. Cuney:

(P. 291) My opinion is that the private coal cars have increased since 1916. I know personally of a number of concerns that have (p. 292) gone out and bought cars because of their experience during the car-shortage periods from 1916 on.

I know of only one instance where private cars have been bought from the owners by the railroads since the car-shortage periods of 1919 and 1920. I think the Baltimore & Ohio made some arrangement with the Bethlehem Steel Corporation, as a result of which it took some cars that the Bethlehem Steel Corporation had been using, and I believe there was an application made to the commission for permission to issue certain securities in that respect, and I have a recollection that that states something about a preliminary and preceding arrangement incident to the final consummation of that sale. I do not know whether any railroads have sold or leased cars to operators for private use in the last few years. I do not recollect that. If private cars were taken off the assigned-car basis, I think the result would be that a lot of consumers who have insured their continuous coal supply by buying cars (p. 293) and keeping them in their service would find, in a car-shortage period, that they would be in the same predicament that other coal purchasers were, and, to the extent they were short of coal, would go into the spot
1719 market for the deficiency. As to whether or not this would result in the private-car owners losing their property, that is a constitutional question. I do not think it would deprive them of their property. That seems, thus far, to have been guaranteed in the transportation act of 1920.

By Commissioner Aitchison:

As to whether any of these private car owners, such as the Public Service Corporation of New Jersey, are beneficiaries under the transportation act, in one provision of that act it gives this commission the right to disregard ownership of cars in doing certain things in times of emergency. The authority is given so that it may disregard ownership as between carriers. That has always seemed to be an express saving of the right of the private car owner, even in time of emergency, and I would assume, therefore, that you were not going very far to say that if his rights were protected in a car emer-

gency Congress did not intend to take them away in times of ordinary business. (P. 294) That is what I mean by the transportation act saving the benefits to him, and I also consider that paragraph 12 is a reenactment of the Traer & Hocking Valley case rules with the protection therein given to the private car.

1720 By Mr. CURRY:

(P. 294) As to whether railroad men from an operating standpoint are in favor of private cars, that differs on different railroads. Some railroads do not want them and some do. The Norfolk & Western, I believe, refuse to operate private coal cars for the loading of coal at mines on its railroad. I believe it handles other privately owned coal cars loaded elsewhere. I do not know of any other railroad.

As to the statement by Mr. W. W. Atterbury, general manager Pennsylvania Railroad, referred to at page 194 of the commission's report in the so-called Coal & Oil Investigation, dated January 25, 1907 (p. 295): "From a transportation standpoint, I think every railroad man in the country would be glad to see the private car abolished," I think, strictly from a transportation standpoint on his railroad at that time, he was probably correct. I have never talked with General Atterbury about it since, and I have talked with members of his staff, who seem to think that the private car is a desirable thing. I am inclined to believe that it does not make for transportation inefficiency. In some respects it makes for transportation efficiency and is a desirable thing. If you could pick up a train of private cars at one mine, and they are going intact, in a regular flow of traffic to a certain destination, to a certain consumer, you can take that train intact and practically handle it through yards intact and thereby relieve yourself of yard operation, as I understand it, whereas if you pick up the coal of that purchaser from a multitude of mines you may be put to the yard service of assembling and the like of that.

(P. 296) With regard to the following statement on page 8 of the same report:

"About a year thereafter a report was made to Mr. A. J. Cassatt, president of the Pennsylvania Railroad Company, by a com-
1721 mittee of officers, recommending that the equipment of the company be increased, looking toward the final elimination of the 'individual car.' The reasons for the abolition of the 'individual car,' as given by the committee, are as follows:

"Reduction of switching in the terminal and intermediate yards, reduction in empty-car mileage, elimination of tracing and special movements made at owners' request, the saving in yard and clerical forces, which, measured in money, is estimated at $225,000 per year for the lines east of Pittsburgh and at $50,000 per year were it possible to do away with the individual cars on the lines west of Pittsburgh.

"From a traffic or commercial standpoint:

"The avoidance of constant irritation and jealousies from suspicion of preferences and the avoidance of charges of discrimination, it being assumed that the railroad company is prepared to furnish regular supply of cars.

"It cannot be denied that with our limited freight-car equipment the use of individual cars materially assists in the taking care of important shipments, insuring to these interests a regular supply of cars, and if the cars are taken over by the railroad companies and the cars are divided strictly on basis of production there may be times when the railroad company will be unable to handle important items of traffic at the proper time."

That is a pretty long statement to say something in regard to. It is made up of a multitude of different things.

I recognize one thing in there that he said with respect to empty mileage, and I am just wondering how a committee of railroad men relied very much upon that in view of the fact that as a gen-
1722 eral proposition your coal-car movement is looked upon as well nigh a 50 per cent empty movement anyway, except in a few isolated instances.

As to whether the railroads have reversed the stand indicated at page 77 of that report, namely, "Nearly every railroad officer and coal operator who was examined on the subject of 'individual cars' condemned their use," I could not say, except as I have already said that some railroad men seem in favor of private cars, and some against.

The northwestern railroads (p. 299) store coal in anticipation of winter, and in addition have a large reservoir of coal on the Lake Michigan and Lake Superior docks, most of which is ultimately burned as railroad fuel. The New England railroads customarily store, I believe, it is said, from 60 to 90 days supply of coal, and aim to have that ahead by along about the middle of November. Generally the Canadian roads put by large quantities of coal, and the western Canadian roads also have a reservoir at their upper lake docks. As a general proposition you will find that the railroad fuel stocks, both on wheels and in stock piles, will vary about as the distance from the source of supply. Obviously some of that coal has got to be put in beginning in the summer.

If the assigned car rule were abolished and the carriers had made no contract to store their coal in the summer, they would be confronted with the question of either buying high priced spot coal, or of confiscating coal in a severe period of car shortage, unless they had largely overbought, or had bought from a larger number of mines a much less than output quantity, and the operators lived up to their contracts 100 per cent. As to whether abolishing the assigned car rule would be a practical incentive to the railroads to buy their coal in the summertime and store it or to make long term con-
tracts, I do not think it would get them any more coal on
1723 the long term contracts than it would on long term contracts without assigned cars. (P. 300) It might, of necessity, impel

them to put more money into stock piles of coal. I think that it would be an incentive.

As to whether from a public policy standpoint that would tend to result in the operation of mines during the summer time, and have more or less constant business throughout the year, there is a vast amount of misconception about the operation of mines in the summer time. If you will study the statistics of coal production in different sections of the country, you may be surprised to find that there are some railroads that produce more coal in the summer time than they do in the wintertime, and this seasonal proposition is not nation-wide at all. (P. 301) It might well be that if you drive some railroads to the purchasing of coal in the summer time in districts that now produce a very considerable volume of coal in the summer time, you might make things worse instead of better.

By Commissioner AITCHISON:

The lake coal districts are a shining example; districts that furnish particularly industrial coal as distinguished from those districts that furnish a large amount of domestic coal, very frequently furnish coal comparatively evenly the year round. [To] New England the ocean movement normally runs better in the summer time than it does in the wintertime, because of weather conditions, and the result is that the railroads that are factors in this movement do not have such markedly seasonal production as is generally supposed. I think probably that the New England roads, if they had no protection by assigned cars, instead of storing 60 to 90 days might have to store 120 to 150 days.

(P. 302) The roads at the head of the Lakes, to the extent that they would have to live out of the commercial stores at the head of the Lakes, might be in a different position. They have to get their coal during a certain season anyway. To a considerable
1724 extent that is true of New England, because of the exigencies of ocean navigation.

By Mr. CURRY:

As to whether the power of the carriers to give assigned cars to its mines gives them an advantage and enables the carriers to make very favorable contracts for coal for fuel use, I think that it enables the carrier to make contracts at a somewhat lower price in some instances than commercial consumers would pay, and I would like to supplement that by the statement that in the experience of the Central Coal Committee we found commercial contracts that were some considerably lower than the railroad-fuel contracts, on assigned cars. I would not say generally speaking they can make a (p. 303) better contract. I do not know the extent to which they have a better price. I do not know that that is the constant charge of the operators.

With reference to the following quotation from page 68 of the report referred to [the Coal & Oil Investigation report]:

"The reason advanced by the officers of the railroad for this [assignment of cars] was that it enabled them to get cheaper fuel, in that an operator loading fuel would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal, and while the profit of the operator on fuel coal would not be large, it enabled him to keep his miners regularly employed and his plant in operation and gave him an advantage over a competitor who has no order for fuel coal," (p. 304)

1725 the first thing that I would like to say is that this report is dated January 25, 1907, and I assume therefore refers to the assignment of cars under the rule preceding that laid down in the Traer and Hocking Valley cases.

If there was opportunity in that previous rule to get a better price for railroad-fuel coal, there is far less opportunity under the existing rule. As to what the price is I do not know. I assume that it is lower in a great many cases than the commercial price, just as I would assume any man who would buy a million tons of coal might get a price better than the man who would buy a thousand tons of coal. The extent to which the car figures in it as to price I do not know, but it is no news to me that the operator raises the cry that the assigned car gets a better price for railroad fuel. As to whether that is true now I do not know. I have nothing to do with the purchasing of coal, and I simply repeat what I said, that my understanding is that that is the cry that is constantly made, and I suppose there is something to it.

(P. 305) Generally speaking, public utilities, not including the railroads, have to go without assigned cars, except where they have bought private cars. As to why they should be placed in any more unfavorable position than the railroads, I would say that for no other reason than that if the railroads do not first get their coal the public utilities will be in even greater difficulty, and the consequence might be the necessity on their part of even greater protection than the commission gave them by the assignment of cars without count in 1920. The public utilities have to provide for coal beforehand and have to store it, but the public utility as a rule is located, as far as storage is concerned, at a point. The railroad facility, of course, has to have a mobile supply that goes over a good many miles of line.

1726 By Commissioner ATTCHISON:

The biggest public utility in the United States has fine storage piles in and about New York City, I understand. (P. 306) The Interborough, I understand, has some different storage piles in and about New York City. I can not say whether the Interborough in

New York can get more than five days' storage under any possible circumstances. I know that their storage is limited, but I don't know what it is. I understand that their storage is low in days of supply, but I do not know what it is.

By Mr. CURRY:

If on a particular day mines A, B, and C are the only three mines on a railroad, and each mine has a rating of 30 cars, each orders 30 cars, and the number of cars actually placed prior to 7 o'clock a. m. is 19 assigned cars and 3 unassigned cars at mine A, 24 assigned cars at mine B, and 14 unassigned cars at mine C, the total number of cars placed shows the car supply for that day to be 60 with 90 ordered and, therefore, it is a two-thirds car supply. To find the first percentage, you determine the total number of cars available and divide that by the total of the ratings, or if in any case the order is less than the rating, you would use the order, and in this case we can leave out the order because they are the same as the rating. The first per cent would be 60 cars, the cars available, over 90 cars, the total rating, which would be $66\frac{2}{3}$ per cent. (P. 308) Mines A, B, and C would each be entitled to 20 cars. Under the assigned-car rule you would have to eliminate B because there were 24 assigned cars I assume placed, which would be 80 [20] 1727 per cent in excess of the $66\frac{2}{3}$. The way it would look to me B would be eliminated because it has more assigned cars than the first percentage, which would only give 20 cars. Mine A would have 19 counted against it because not up to the distributive rates. I would eliminate mine B and leave mines A and C. That is the way it looks to me. (P. 309) In computing the second percentage you would have requirements of 60, the cars available are 36, or 60 per cent.

By Examiner BARTEL:

Mine A has three unassigned cars, and under the rule they would only be entitled to one unassigned car and there would be an overplacement on that basis.

By Mr. CURRY:

On the second basis each mine would be entitled to 60 per cent and mine A would be entitled to 60 per cent of 30 cars, or 18 cars, and mine C would be entitled to 60 per cent of 30 cars, or 18 cars. I would say on the basis of 19 being in excess of 18 that you would go to a third percentage. (P. 310) You would be down to one mine, then. You would eliminate A and B and it would leave C. You would have 30 cars in your rating. Then you would have available your three unassigned cars shown as having been placed at mine A and 14 [un]assigned cars shown as having been placed at C, which is 17 cars. The third percentage would be 17 divided by 30. 17 30ths of 30 would be 17 cars. (P. 311) So that mine C would be entitled to 17 cars. But it only got 14 cars. I would

take it that under rule 11 it would be shown as three cars short. Then mine A would be shown as three cars over, those three unassigned cars.

1728 By Commissioner ATTCHISON:

As to whether or not the car distributor would follow through these three computations, I do not think he follows them through in the way Mr. Curry and I just went through them. He does not cut off his day and know that he has got exactly so many cars at exactly such an hour and that that is all he has got and all he is going to have. He has to work on a rule-of-thumb basis to get the greatest efficiency out of his cars, and I assume balances up afterwards. (P. 312) He can balance by taking these figures subsequently, I assume, and work it out then. I have already tried to explain that I don't know just what he does do, I think he does, I think that he ought to, under this rule, and I assume that he does.

By Mr. CURRY:

As to amending rule 9 so as to provide more clearly just how these percentages are to be arrived at, I certainly would have no objection, if it is not clear, to making the rule clearer. As to whether rule 9 seems to indicate that two percentages are taken instead of the number of percentages necessary to finally eliminate the assigned cars, I think that may be a fair criticism of the rule, but I have talked with some of the transportation men who spoke of more than one percentage and more than two percentages.

I did not know that on the Pennsylvania Railroad during August, 1920, on the Conamaugh Division, on the sixth day of that month, the first percentage, computed as just indicated, was 57.9 per cent, the second percentage 9.9 per cent, and the third or final percentage of distribution for commercial cars one per cent. (P. 313) All I know about the Conamaugh Division is that it is a great railroad-fuel producing division. I know nothing about its

1729 percentages.

(P. 314) I did not know that the first percentage on the Conamaugh Division for the month of August, 1920, the average first percentage, was 81.71 per cent.

By Commissioner ATTCHISON:

(P. 315) We never got any divisional figures, and for that matter, even with respect to entire railroads, we never got any record of these first, second, and third percentages. I have never seen any of these and know nothing about them.

By Mr. CURRY:

As to whether there is quite a difference or considerable difference between the first percentage and the last percentage I do not assume that ordinarily there would be. I can see where in some certain cases, certain districts, where large amounts of fuel coal are produced, in certain (p. 316) cases where the shortage is acute,

especially under the circumstances that governed in August, 1920, when cars were arbitrarily in other districts for the protection of particular coal loading, you might get a larger difference than ordinarily would govern.

I have heard it said that ordinarily a commercial mine situated in an assigned car district would be in a very much worse position than a commercial mine situated in a district that did not have many assigned cars. I do not see myself why it should necessarily follow under a proper scheme of car distribution. I do not know that it is true, but I can see why there would be in that district or similar districts, under those circumstances, some wide differences.

1730 By Mr. BOYLE:

(P. 317) I have some definite recollection that the Geological Survey, as a result of the figures assembled by the Fuel Administration based on 1918 performance, put the per cent of coal consumed by the public utilities as a unit, not including the railroads, at about 7 per cent.

By Mr. FLETCHER:

I understand that soft coal deteriorates in storage particularly in the case of coal from certain districts much more so than the coal from other districts. I would say that the coal which moved to the head of the Lakes by water and is moved into the Northwest in that way can stand storage better than the coal in the Illinois territory. From all I have heard of coal, I would say that that was undoubtedly true.

By Chairman McCORD:

As to soft coal from eastern Kentucky, that is included in the coal that goes to the head of the Lakes. I would say that that is one of the best coals to stand storage that there is. It is a very high grade coal, as I understand it. (P. 318) I understand western Kentucky coal is not by any means as good as the eastern Kentucky coal. It is more akin to the Illinois coal.

I have heard it said that the coal which the Louisville & Nashville Railroad obtain from eastern Kentucky is as good as the best Welch coal. I think they can store that coal up and down the line of the railroad at different places far better than most coals. Railroads do this to a very material extent. I have tried (p. 319) to explain that I think they do it to about the same extent as the ordinary
1731 commercial consumer. I do not think that storage of coal by railroads down their lines in the dull season would obviate the necessity of assigned cars, because I think objection would be made to the assignment of cars to protect the loading of that coal for that storage pile and for distribution over the line.

By Commissioner ATTCHISON:

I have had coal people talk to me about that objection.

By Chairman McCHORD:

If there were 500 miles of line, and at each 100 miles they had coal stored, they would not have to carry it as far as if they only had one pile. It is not impossible to do that. I might say, talking about the quality of coal, that I have heard it said that (p. 320) this coal that the Union Pacific uses, if it is stored, will blow away. The man who told me said that they had coal storms out there just like they have dust storms in the southwest.

By Commissioner LEWIS:

(P. 322) The round-robin system is merely a detail of any system of car distribution.

By Commissioner AITCHISON:

(323) That is provided for by our code. You can do that provided the operators in the district agree.

Mr. FLETCHER. That is as far as the railroads can proceed at this time.

EUGENE McAULIFFE, called as a witness for Union Colliery Company, having been duly sworn, testified as follows:

Direct examination by Commissioner AITCHISON:

1732 I am not represented by counsel. My residence is St. Louis.

(P. 324) I am president and general manager of the Union Colliery Company, and am appearing on behalf of that company. I am not appearing for any association. My company is a large investment and development in southern Illinois. I have had some years experience in the production of coal and a greater number of years in the service of the operating department of railways, having been formerly connected with the St. Louis & San Francisco, the Chicago & Eastern Illinois, the Chicago, Rock Island & Pacific, and affiliated and subsidiary lines. (P. 325) The term "coal car" is a misnomer. Perhaps it was more applicable to the class of equipment that we now term "coal cars" at one time than it is at present. I prefer to refer to that type of equipment as "open-top equipment" for the simple reason that a multitude of shippers of divers classes lay claim to its use. Some limited percentage of the so-called "coal cars" are equipped, in fact, for the movement of almost any other commodity.

In my 25 years of railroad and coal-producing experience I never saw a coal-car shortage. I do not think there is any such thing. My observation has been that it has invariably proved to be a transportation shortage (p. 325) and not a coal-car shortage or open-top-car shortage.

Q. [By Commissioner AITCHISON:] (P. 326). In other words, what the trouble is oftentimes is not that the amount of equipment is not sufficient to transport apparently the amount of tonnage which is offered, provided it could be gotten to the point where it is needed and moved over the rails, but the cause comes through congestion,

lack of motive power, and other matters of that character. Is that what you mean?

1733 A. Yes, Mr. Commissioner. My thought is that if the other limitations that attach to the transportation service were remedied or corrected, the railroads could perhaps dispense with some of the coal cars or the so-called coal cars that they now have.

In many cases that would involve perhaps additional terminal facilities and additional tracks. Perhaps some greater measure of cooperation between the coal operators and representatives of the carriers would help that situation also.

(P. 327) I think that the coal car and all of these elements that surround distribution more directly concern the consumer of coal, the man that pays the freight, and I believe that if the economic operation of the roads is taken into account and proper consideration is given the man that pays the freight, the operators' interests will be best served, without direct consideration to his frequently real and often imaginary troubles.

(P. 329) I do not favor the assigned car. I think it represents a disturbing element. A great many things were necessary during the war period, but inasmuch as the carriers have practically divorced themselves from all of the different expedients put into effect at that time, I see no particular reason for singling out the assigned car privilege and attempting to retain it. In this connection I might say that not only out of my long experience in railroad service, but because I believe that the cure of the ills that the railroads are now subject to will best serve the coal industry and the people that consume the coal, if I display partisanship I think it will be on the side of the carriers.

1734 By Commissioner Lewis:

On the question of assigned cars, if the railroad should return to the old practice of getting their fuel, I think it would bring about a great many inequalities and injustices. As to the quality of the coal they (330) would be using if they drew from all kinds of mines on the basis they formerly did in the Illinois field, for example, it wouldn't prove less effective for locomotive use. I think that there is no problem that the assigned car will cure, that can not be taken care of better by an intelligent purchasing policy and proper relations between the coal operators and the carriers who purchase the coal. In that connection I was charged with the duty of purchasing coal for as much as 15,500 miles of railroad, and I never used the assigned car and never approved of it at any time. I think in the final analysis most operators believe that the theory of the assigned car works down to the end that the carriers purchased their coal with part money and part car supply during times of car shortage. During times of car shortage the car is not by any means to be compared with the money. It is real money to the operator, and is reflected in his earnings. I unfortunately find myself unable to endorse the rules submitted by the

commission tentatively. I have never endorsed Circular C. S.-31. I have prepared a memorandum and will suggest, with your permission, certain changes in the rules presented.

By Commissioner ATTCHISON:

(P. 338) I understand these rules are not submitted by the commission, even tentatively, in the sense that it has vouched for or written a word out of them. They were proposed to the commission by the carriers with certain modifications, having the approval of the National Coal Association.

1735 JULY 19, 1922.

(P. 351) I would revise rule 6 (d) to read:

"(d) All cars of other than railroad ownership (commonly called 'private cars') placed for owner's loading shall be considered as ordered and will be placed at the mine for loading in number equal to the pro rata share of all cars to which the mine is entitled."

Explanatory of that I would say that in the revision of rule 6 paragraphs (c) and (d), provision is made for (p. 352) placing all privately owned cars in the mine designated for their loading, the number of cars so placed to equal the pro rata share of all cars to which the mine is entitled. In substance, this revision provides that privately owned cars will be placed for loading as designated, but only in such numbers as will give such mine a measure of running time equal to the running time afforded other mines served by the same carrier. I believe there is a place for the assigned car. I believe that the roads that are not gifted with coal mines located on their own rails, and who are dependent for fuel supply on mines perhaps reached by two or three additional carriers, should be required to purchase and maintain a sufficient measure of equipment to take care of their fuel requirement, and perhaps to take care of the requirements of consumers of coal on their rails, and certainly, if so provided, such cars should be moved to the mines where they are to be loaded and the empty car billing of that carrier should be honored, and cars placed, loaded, and returned with all reasonable promptness. I think that special equipment purchased and maintained by certain carriers for fuel purposes represent an economical necessity, and certainly these cars (p. 353) if bought for that particular purpose mean operating economy and should be taken care of by connecting carriers and loaded and returned without diversion.

1736 By Mr. FLETCHER:

If a railroad has no coal on its own rails but owns a coal mine on the rails of another carrier, or has contracted for its entire output for the entire season, and if the car distribution rules are amended as I would recommend, that mine, by whomever owned, would not receive a percentage of cars to the equivalent percentage of running time, in so far as the car supply is concerned, greater than that of its neighbors that were in the general commercial mar-

ket. The matter of the number of cars that the fuel-purchasing railroad should send would be a matter that should rest between the transportation officers of that company and the transportation officers of the company on whose rails the company (p. 354) mine is located. I do not think that the car, one of the many instrumentalities of transportation, should be tied into any purchase situation whatever. It should be maintained as an instrumentality of transportation and so used. It represents to my mind a component, and the most important part of the rate structure. I think our whole freight-rate structure is valueless if we do not permit the instrumentalities to make its use possible; and certainly at a time like this, or like the period we are rapidly moving to, the empty car bulks very much larger than the rate.

By Commissioner Lewis:

If the Pere Marquette, for example, is getting its coal supply from a mine on the Monon under contract and the Monon is able to supply its mines with 50% coal cars, whereas the Pere Marquette is in a position to put to the Monon enough cars to supply that contract mine with a 100 per cent of their cars, I would limit that contract mine to a 50 per cent level which the Monon is able to supply their own customers. (P. 355.)

1737 By Commissioner Aitchison:

The inevitable result would not always be that the Pere Marquette would have to hold back cars of its own, or else the Pere Marquette cars would be distributed to the commercial mines in part. According to my personal knowledge of situations of that character, the car service department of the road where the mine is located would keep a stream of those cars running, and attempt to meet the contractural requirements of a purchasing carrier for the car-service rules with all the flexibility that the rules provide, by placing those cars in sufficient number to protect the order of the buying carrier in so far as the rules make it possible. All of these problems can be solved by an intelligent purchasing policy. Assuming the Monon Railroad, taking the specific example, can only furnish a 50 per cent car supply, if I were purchasing fuel for the Pere Marquette Railroad I would divide that order between two companies or two mines, and in that way, in a very simple manner, and without (p. 356) doing violence to any other operation in the vicinity, I would get the measure of coal that I would get under the original arrangement, with the further advantage that there is less chance for two mines failing from the thousand and one causes that affect mine operation and shut off the delivery entirely. I think a railroad owning its own mine, using a portion of the transportation instrumentalities that it has, the remainder of which is necessarily used by the coal people, should take the fortunes of its shippers.

By Commissioner LEWIS:

As to what is to be gained for the public welfare in the example given, by limiting the supply (p. 357) to 50 per cent at the coal mine owned by the Pere Marquette and not engaged in commercial business, I think it will have a far-reaching effect. I feel that today we are approaching an extraordinary transportation and fuel
1738 crisis. I can not in my own mind divorce the transportation situation from the mining situation. To my mind they are inseparably related. Each is very largely responsible for the troubles of the other. Until that situation is recognized by the owners of the coal mines of this country and the railway executives of this country to an even greater extent than it is recognized today, labor and railroad labor will not be tranquilized and we will not get even anything like a flow of transportation. I feel keenly about that because I think it is at the bottom, perhaps, of the greatest national crisis we have been threatened with for some time. (P. 358) I think our insistence that we confine our car-distribution rules to overcoming the maze of technicalities, trying to meet the ambitions and desires of operators with conflicting interests, and carriers who have representatives whose interest, perhaps, should be identical, but because of their position and training are sometimes conflicting, has built up a structure that is contributing to a very large extent, I think, to the condition which confronts the country today. These rules, C. S.-31, have been stated by the very able witness who preceded me as very largely a compromise. A compromise to my mind and to my knowledge between operators who have different views of what they individually should have, and operating officials who, perhaps, desire to get the maximum of efficiency out of the transportation facilities they employ, tempered always by the ambition of traffic officials to use the coal car and the rating rule to extend their particular empire.

By Commissioner ATTCHISON (p. 359):

In the example given it would not be the attitude of the Monon, under the code of rules which I propose, to take 50 per cent, or some fraction—it would be a little more than that—of the cars which are furnished by the Pere Marquette and distribute them to the
1739 commercial mines on the Monon. The Monon would hold them until the next day and the cars owned by the Pere Marquette would remain idle that day. The next day the Pere Marquette, which is able to supply 100 per cent of the cars needed, would retain on its line idle 50 per cent of the cars which otherwise would be in service, with this qualification, that there is nothing in those rules which require holding cars idle for a day, or two or three days. There is nothing in the rules which prohibits the Monon from operating that certain mine 100 per cent for two or three days. I think one of our great disabilities in attempting to compose our differences about these car-service rules is that we insist on dealing with the

situation (p. 360) as of one day's duration and we overlook the cumulative provisions of the rules and the provision which calls for balancing at the end of a reasonable period. If the Monon has but a 50 per cent car supply and the Pere Marquette sends to them sufficient cars to keep an individual mine running a 100 per cent of the time for 30 days, the result would be labor jealousies, the migration of men, in so far as the capacity of certain mines is concerned, from the neighboring mines over to that mine, and the further contribution to the labor unrest which is very largely at the bottom of our present-day coal trouble. According to my observation there would not be, as an offset, some satisfied men at the Pere Marquette mine. Dissatisfaction of the men in the mining industry contributes very much to the general situation. They take what comes to them as belonging to them.

By Commissioner Lewis (p. 361):

The solution in time of emergency would not be by wiping out any identity of those Pere Marquette cars and putting them all into a general pool. I believe the ownership of the Pere Marquette in coal cars should be respected and they should be encouraged to purchase cars. I believe that the delivering line, even
1740 though it may have no mines, has an obligation to itself and the consumers of coal in the matter of maintaining a reasonable number of coal cars. The simple remedy, as I have said, would be that the Pere Marquette purchasing department divide that contract or order between two mines.

By Commissioner Aitchison:

If it owns its own mine I presume it would either sell it or accept the fortunes of neighboring mines.

By Mr. Fletcher (p. 362):

I do not think it is essentially illegal for a railroad to own its coal mine for the purpose of getting its fuel, if it does not use its transportation facilities to give that mine preference over the mines it serves commercially. I see no objection whatever to a railroad's owning a mine if it does not give that mine transportation preference.

(P. 366) By Commissioner Aitchison:

One of the companies owned by the property I am connected with has joint mines served by both rail and water, located in Western Kentucky.

By Mr. Canby:

I refer to the West Kentucky Coal Company which is owned by the North American Company, which in turn owns indirectly the property I operate. Its largest mine has a daily production of about 2,000 tons. It is located at Clay, Ky. The mine I have personal charge of is located in Illinois. It is local to the Illinois Central. (P. 367) I have not personal charge of the operation of any

other mine except this local mine in Illinois. I have an advisory and consulting connection with two other mines located outside of the State of Illinois.

1741 By Commissioner ATTCHISON:

I would revise rule 8 to read:

"Rule 8. Privately owned cars, and cars assigned to certain mines for loading, including those owned by foreign line railroads, whether intended for railroad fuel or otherwise, will be classed as 'assigned' cars and will be reserved for loading by the mines designated, and such assigned cars will be applied on the daily requisitions for cars made by the mines to whom such assigned cars are allotted, in number and to an extent that will complete the pro rata share of cars which such mine is entitled to."

In explanation I would suggest that in the revision of rule 8 provision is made that assigned cars be applied on the day requisitions for cars as made by the mines to whom such assigned cars are allotted, and in number to an extent that will fill the pro rata share of cars which each such mine is entitled to, thereby preventing (p. 368) mines receiving assigned cars from securing a greater measure of running time than that accorded neighboring mines depending wholly on unassigned cars. When I speak of the day unit, that is only in a general and not in a specific sense. I realize the limitations and difficulties of the car distributor, and I know that it will be necessary for a car distributor always to keep certain mines ahead of others, his duties, in a general way, being confined to balancing the mines as nearly as possible at the end of the month or in the first days of the succeeding month.

By Commissioner LEWIS:

If, for example, the Illinois Steel Company, having a large number of privately owned cars, contract for their coal down on the Chicago & Eastern Illinois, no matter what may be its available source of privately owned cars, still I would restrict the operation of those mines (p. 369) to the general level of the operation
1742 of mines on the Chicago & Eastern Illinois. I have specific knowledge of the results of the United States Steel Company's cars and coal movement, in some instances almost completely absorbing the remaining transportation facilities of the Louisville & Nashville Railroad. One of our companies has a local mine, and all mines are local in this territory, in the eastern Kentucky section served by the Louisville & Nashville R. R. I have stood at that mine for days and watched the locomotives and train crews of the Louisville & Nashville R. R. hauling loaded and empty cars past our premises and the premises of our neighbors to the mines of the United States Steel Company to the absolute exclusion of the general commercial traffic. The car is only an incidental feature of this transportation problem. I would hazard the statement that we have too many coal cars, or more than necessary to-day. I have always believed that the

railroads have provided in the aggregate generally enough coal cars. That is not the limitation or trouble confronting the country to-day, or the cause of the shrunken coal production (370) from nonunion mines of from five and a half million tons to four million tons a week. It is the lack of all of the instrumentalities of transportation that has brought about that situation and which is helping to hasten the crisis which we are approaching.

By Mr. FLETCHER:

I can not agree that what I have said about the inadequate facilities of certain railroads or all railroads is a feature that is aside from this inquiry. If the principle of the assigned car is recognized, and the United States Steel Company be assured of an adequate supply of cars and cars alone, but no locomotives, tracks, or terminals, and they can absorb all of the transportation resources of the Highland branch of the Louisville & Nashville R. R., they are receiving a preferential and discriminatory service from the carrier. There
1743 is the situation of the public utilities to be taken into consideration, whose activities are quite as important, in a limited way, to the public as perhaps the activities of the steel company. I submit that the steel company could shut down some of its furnaces with less violence than the Detroit (371) Edison Company could shut down some of its property, it being the principal public utility of Detroit.

By Commissioner LEWIS:

I think that any individual or corporation that will contribute to the general welfare should be encouraged to make that contribution, if no injustice is done to any other citizen or corporation. And I can readily see where a Canadian road, for example, requiring, perhaps, a special type of equipment for specially constructed coal chutes, might find it economical, and might find it advantageous from an operating standpoint, to own a thousand or two thousand cars. Such cars, I think, should be put into trains and moved to the producing points over as many carriers as necessary for such a movement, as nearly intact as possible, but when they get (p. 372) there, I do not think they should be received in numbers that would absorb all of the instrumentalities of transportation that the originating railroad employs. I am in favor of encouraging private companies to purchase cars.

If sufficient additional number of large consumers buy cars under this assigned car privilege, I fear substantially for the effect upon the general consuming public, including the little man out on the prairie who needs a car occasionally.

By Mr. ROTHQUEY:

It is not the duty nor the province of the railroad to equalize the running time of mines, except in so far as the distribution
1744 of cars and transportation (373) facilities obtain. That far and no further, it is its duty to equalize running time. I fail

to see what the carrier has to do with an operator who in an emergency or otherwise, decides he wants to work ten hours, twelve hours, sixteen hours, or any other number of hours of the twenty-four, whether he has a certain number of loaders and a certain number of men, and the thousand and one other factors, variables, that enter into the mining of coal. The carrier has nothing to do with this. It is a question of what this operator does with the cars that he places for loading.

1745 (P. 374) I think the idle-hour time or, conversely, the time that the mines work, excluding all disabilities that the carriers are not responsible for, is the true basis, and when reduced to the simplest form and to the most self-enforcing form is the only basis on which cars can be distributed accurately.

I would revise rule 9 to read:

"Rule 9. If the number of assigned cars placed at a mine during any period, as provided in rule 8, equals the mine's pro rata share of the total available car supply, it shall not be entitled to any unassigned cars."

In explanation I will say that in the revision of rule 9 provision is made for withholding unassigned cars to a mine receiving assigned cars in a number equal to its pro rata share of the total available car supply, all assigned and unassigned cars to be counted in arriving at same.

(P. 375) In the revision of rules 6, 8, and 9, we have in mind the fact that it is not ordinarily the shortage of cars that prevents a given carrier from supplying all of the mines located on its rails, but inability to supply an adequate measure of transportation, almost invariably chargeable to (a) insufficient sidetrack and terminal capacity; (b) congested terminals; (c) insufficient number of locomotives to move all cars loaded and empty. The revision of rules 6, 8, and 9 suggested would, in so far as the service rendered coal mines and consumers of coal is concerned, establish a complete measure of equality in the distribution of the total transportation resources of the carrier or carriers serving such mine or mines, insuring to each shipper, including his mine labor, the opportunity to produce coal, giving also to each and every consumer of coal equal opportunity to secure the quantity of fuel required for his use, whether such consumer be an individual or corporation, and

1746 no deviation from the practice of furnishing an absolute equitable distribution of all of the instrumentalities of transportation available should be tolerated except in the case of an extreme emergency, which should be met by the Interstate Commerce Commission in the manner prescribed in the transportation act, 1920.

By Commissioner ATTCHISON:

(P. 376) That is, by declaring a suspension of the existing distribution rules and ordering that the emergency be met by a specific action on the part of the carriers. That would have the identical effect, I think, as the assigned car rule, but such effect would be of

temporary and indefinite duration and would not furnish a basis for a contractual relation which would run prejudicial to other users of coal for a period of months or years.

I hold the theory as fundamental that the carriers must have enough coal to operate. If I were handling the carrier and needed fuel I would resort to almost any expedient. I would throw all the existing rules temporarily to the winds until I had met that situation, trusting to the good judgment of the commission and all other authorities to endorse my conduct, assuming (p. 377) that I handle the same fairly. As to the difficulty the Pere Marquette might have in getting the Monon to do that I do not understand that any situation, any emergency might arise that would effect the Monon Railroad in its fuel supply as serious as the one which has occurred in the last three months and a half and which has not been a matter from [for] car distribution rules or condition. If the Pere Marquette will prepare and apply a reasonable purchasing policy and distribute its tonnage between two lines [mines] instead of one, or three mines, and all three of these mines shut down, it would have a problem that would have to be met. Assuming that they purchase 100 per cent of the output of the mine that they own or contract with, and they distribute that over two mines, they still, I
1747 think, would get a sufficient measure of fuel until that disability was corrected. (378) When it is necessary to resort to some measure outside of the usual equitable rules for distribution it is better in the public interest and in the interest of the shippers that that be done by an emergency order of the commission rather than by an assigned car rule, or I think it should be done by the officers on the ground without annoying the commission with the details, which should not only be corrected but readjusted before the commission could get the facts before it. I don't think that would leave them liable for a civil suit for damages. I think that most of the troubles and difficulties with damage suits flows from persistent disregard of situations extending over a period of months after they have been urged to rectify the same. (P. 379) The carriers ought to do this without legal protection in minor matters of that sort and with the assurance that if the matter were brought to the courts their equitable emergency handling would be justified. All of us take hazards—that goes with the operation of railroads as well as with other lines of business. As I have suggested, this lawful method (the assigned car rule?) sets up a train of collateral irregularities that are more burdensome and perhaps more dangerous, in the aggregate extending over a period of months, than anything that might occur from the temporary emergency. I think that nearly every emergency of that sort of a temporary character can be met by the carriers and reparation made the operators who were discriminated against for a few days without prejudice (p. 380) to any interest whatever. There is an elasticity given carriers in the existing rules to adjust irregularities in conditions as soon as possible.

I think an intelligent, broad purchasing policy on the part of the United States Government—and I believe such does now exist—will take care of every contingency that might come up on behalf of the Government, and if anything unforeseen comes up I believe
1748 we can depend upon it being met without specific revision in rules which would be used against their interest. So far as the public utilities are concerned, I think that under ordinary conditions they are quite out of this situation. They have been taking the punishment, and the people that use their product of course have been paying. They perhaps store more coal and have better storage facilities in the aggregate than the majority of consumers. When I make that statement I might say I am directly attached to one that has very little facilities. So I am attempting to speak from a nonpartisan standpoint. (P. 381) The States and municipalities compose only a small percentage. I think it was very serious when the city of Philadelphia was down to eight hours' supply for its water system. As to the situation of Pittsburgh, when on the Fourth of July, 1920, it found itself with less than one day's supply of fuel for its water supply and heat, I think it was entirely within the capacity of the railroad serving that city to take care of that situation, unless there is a general interruption of production such as obtains in that territory to-day. I mean in so far as transportation is concerned, and without attempting to create rules to run continuously. I have in my past experience diverted thousands of cars to indigent communities and incidentally to individuals, in order to protect their immediate requirements. I think there is such a thing as having too many laws and incidentally too many rules. I am perfectly willing to trust that situation to the railway executives, believing that they will cut trains off before they will permit waterworks to shut down in any place of importance and that they will be justified by both the commission, State, and municipal authorities, and the general public.

1749 (P. 383) I would revise rule 11 so as to read:

"Rule 11. If a mine receives more or less cars than it is entitled to during any period, as provided in rule 6, it will be charged on a monthly cumulative basis with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable."

Explanatory of that, direct reference to the monthly cumulative basis on which cars are ordered and furnished to individual mines is attempted. (P. 384) I would say that perhaps all, or nearly all, of the perplexities that I have noticed arising in car service and car distribution hearings arise from the fact that nearly everybody seems to ignore the accumulative provision of these rules. The fact of the matter is that it is not possible for the most perfect car distributor in the world to maintain balance of distribution between mines for one day or two days or three days. The car distributor necessarily has a system. It is the simplest one in the world. He

has a working sheet before him on which he writes daily some salient points of these reports made to him, and he carries the cumulative results forward for each individual mine and for all mines in his district; and it is that single point that he directs his activities to in placing of cars preferentially, ignoring the thousand things as to what John or Jim may have asked for or needs—assuming he gets correct information and is making an honest distribution. I think the majority of distributors recognize and try to handle things fairly. There are limitations attached to the job of distribution (p. 385) which rest elsewhere than with the distributor in the majority of cases.

1750 By Commissioner ATTCHISON:

(P. 395) Most of all we want uniformity in the rules. I think there would be no difficulty in having individual rules in different districts where these carriers do not come in contact with each other at joint mines. But, for example, in Illinois, where the joint mine is more numerous, and incidentally the tonnage of that State is one that must be reckoned with, I think you would create a conflict. (P. 396) I see no reason why a uniform set of rules cannot be made the same as a uniform set of demurrage rules. (P. 397) The round-robin system may be applied everywhere if it is approached in the right spirit.

(P. 399) We have a potential coal production in this country far in excess of the requirements of the country, and the problem has invariably been one of getting the consumer to purchase, which because of his irregularities very largely contributes to this car situation that we are troubling ourselves about. The operator is helpless in that situation.

Cross-examination by Mr. BRANNON:

If the railroads are not permitted to use their cars at will for the carriage of their fuel coal through the assigned car method during a fifty per cent car-shortage period, the railroad could secure its coal without confiscation (p. 400) by so distributing its purchases that under a fifty per cent car supply it will receive all the coal that it would get if it were concentrated in fewer mines. That would not require the carrier to overcontract. I am not dealing with a theory when I make this statement. The majority of the carriers get their fuel requirements, even those remote from the mines, without the use of assigned cars.

1751 (P. 401) The carriers now in their entirety in the absence of specific figures from any individual carrier only take, including their anthracite operations, about 25 or 28 per cent of the coal produced in the country. Assuming fifty per cent car supply, the carrier that does not purchase more than 56 per cent of the output of an individual mine will be entirely inside of his contract situation when he gets down to a fifty per cent car supply. (P. 402) I think it entirely possible for the carrier and the operator to ar-

range a contract, setting aside designated tonnage of that mine for preferential delivery to that carrier. They do it in the case of commercial contracts. It would be necessary for the operator to prefer the railroad. I think he should be preferred. I think the operators' preference situation (by the railroad) creates a train of difficulties that eventually bring about greater disorder than these contractual preferences.

It is feasible for a railroad to store coal. I do not regard the use of the carrier's coal-car equipment to and from its storage bins as coming within the purview of paragraph 12, section 1. A mine owned by a carrier which employed men to take coal out of the ground should come within the purview of that statute, because in the case of a storage pile there are not (p. 403) the very serious disturbing labor factors that are involved in the case of unequal distribution at the mines. I would treat cars put at that storage pile, which, due to their proximity to the point of consumption, are limited in number, in the same category that I would place the remaining coal cars that are handling rock, gravel, and the thousand and one other commodities other than coal. The ideal condition is for the carrier to store the coal where it can be delivered from the
1752 stock pile to the locomotive tender without secondary transportation facilities. I see no difference between a coal mine owned by a railroad in the matter of the demand that it makes on the transportation facilities of that railroad than one owned by a public utility whose output goes to a public utility. It means the concentration, not of cars alone, but of all transportation facilities to a certain extent, in the service (p. 404) of that mine, with these resulting labor complications. I would treat a stock pile on the mine premises as a component part of that mine. Stock piles so located are part of the mine operation.

(P. 405) If the Seaboard Air Line does not haul enough coal commercially to confiscate enough for its own purposes, it can get its coal in a period of car shortage by buying and storing during the easily purchaseable and ordinarily cheap transportation period—the period of lowest transportation cost—a sufficient tonnage to tide it over this stress period, that ordinarily is brief, at least when not created by major labor disturbances such as we have now.
1753 The cost of storing coal, getting it in and out of the car, is not very expensive. It is not at all prohibitive. I am prepared to say that the economies that would flow from the lower cost of transporting it during periods of minimum traffic density and adverse weather conditions would much more than offset the cost, including the item of handling and deterioration. As to whether there is a difference between the rule applied in the distribution of privately owned coal cars and privately owned refrigerator cars or any other privately owned cars (p. 406), I am not familiar with the refrigerator or private car situation. My experience has been all of my life very largely confined to the coal situation. I am not a general traffic expert.

By Mr. FLETCHER:

If a railroad which has a legal and sufficient coal car supply, and thereafter by purchasing a coal mine or developing a new coal mine, adds to its previously existing equipment 1,000 cars which it proposes to devote alone to the securing of fuel from these mines which it owns, but which it never puts into the general transportation service, and there comes a period of acute car shortage, I would see objections to rules which would permit that carrier to use this additional supply of cars for the purpose of securing its fuel, if the application of these cars to certain individual mines gave that mine a greater pro rata of car supply than its neighbor mines received. I do not think the question of whether or not the railroad has been in the commercial business [in respect to its mines or its cars] should enter into the thing. My thoughts are directed to the unfortunate result that that situation has on the whole coal and railroad structure. I think that this assigned car is an expedient used
1754 to overcome a situation that could be corrected very much more easily and more thoroughly by efforts in another direction. I am not reflecting on the service rendered by the Illinois Central Railroad, but in the operation of our mine there, the entire output going to two public utilities, we lost during March, 1920, 63 per cent of running time because of the inability of the Illinois Central R. R. to furnish us cars. The compelling facts in the case were that the (p. 408) Illinois Central R. R. had plenty of cars but they were on the rails of connecting carriers that would not return them—one of those carriers, if my memory serves me right, having 184 per cent of its ownership on its rails, and these cars idle by the hundreds or the thousands, possibly. Now, the railroad company out of the assigned car situation can cure its individual emergency, perhaps, but the conditions in so far as the general consuming public are concerned—the people that take the other 72 per cent—are accentuated by the application of that palliative remedy. I think the rule should not permit the use of cars for private transportation by railroad in supplying cars for its own fuel purposes to mines owned by it and not in the commercial business, for the reason that the fuel problem of the Illinois Central to-day and any other railroads contiguous to the Illinois Central, is (p. 409) the identical problem that confronts our utilities to-day, the labor problem, and these palliatives and temporary expedients and compromises only in the aggregate accentuate that situation and they are not constructive nor permanently remedial.

By Mr. BOYLE:

I have already stated very plainly that the cars are but one of the instrumentalities that enter into the whole problem. The tracks, engines, and the rest of them have to be considered when you come
to consider the question of car distribution. I think the
1755 car is really, under the existing conditions, a minor instrumentality, not major.

By Mr. LIVERIGHT (p. 412):

If the spirit of the rules were maintained over a rating period; that is, 30 days, I would give the carrier and its officials latitude in the placing of cars on individual days. I said that it is not possible to maintain an equalization over one day. But over a period of 30 days the pro rata should be granted as closely as possible between all the mines regardless of fuel contracts or otherwise. A wider distribution of fuel supply orders would be one way of handling it. That would be the practical effect of having that rule in force, in the case of the mine output purchase (413) being eliminated. I think it would tend to stabilize the labor conditions in the particular section of the country. I did not say that the Illinois Steel Company uses an undue proportion of the facilities of the Illinois Central with its cars. I said the Louisville & Nashville R. R. I have no knowledge of the rate situation as between the steel company and the Louisville & Nashville. I have not examined the car service rules for some time. My last information was that the carriers paid a mileage rate for the private cars to the owner of the car. I would not think that the carrier charged him anything additional for the extra use of their facilities if the coal was moved on tariff rates. (P. 414) I do not think that the owners of private cars get a bonus in the form of mileage returns. He gets pay, but I think it is rather meagre pay. He gets a return in another direction. If instead of getting pay, he was required to pay, I think that plan would
1756 add new complexities. I do not think it would result substantially in the elimination of private cars. I think that would largely depend on the measure of compensation paid. If it was paid sufficiently high, I have no doubt it would.

By Mr. BOYLE (p. 415):

In saying that private car owners get their compensation another way I mean the compensation comes in the form of a cheaper fuel supply, primarily, which, in the case of the United States Steel Company, is reflected in the form of cheaper mine operation, they producing the major portion of their own coal.

By Mr. BOYLE (p. 431):

As to putting in the assigned car rule, in the present situation aside from the practicability of that rule under ordinary car shortage conditions, I think it would perhaps be seized upon and capitalized (p. 432) very much as the technical refusal of certain operators to meet certain miners has been capitalized, to the detriment of the general commercial situation and the transportation machine of the whole country.

1757

Nov. 15, 1922.

(P. 447) AUGUST G. GUTHEIM, was recalled and testified further as follows:

Redirected examination by Mr. FLETCHER:

I have before me certain documents which have been requested by the commission and by parties of record in this case. The first is a record showing the private ownership of coal and coke cars from January 1, 1916, and each January first thereafter, and also March 1, 1922, compiled from sources shown in the exhibit.

These documents were offered and received in evidence as Exhibit No. 13.

Next is a statement showing the percentage (p. 448) of cars for bituminous coal loading at mines on the New York Central and Buffalo, Rochester & Pittsburgh Railways, for the calendar years 1917, 1918, 1919, and 1920. These figures are obtained from the records of the car service division of the American Railway Association; the earlier years from the records of the old Commission on Car Service, and throughout the period of Federal control from the records of the United States Railroad Administration. They were compiled under my direction and I believe them to be correct.

This statement was offered and received in evidence as Exhibit No. 14.

Next is a statement showing the ownership and capacity of open-top cars of the Norfolk Southern Railroad Company and the Seaboard Air Line Railway Company on January 1, 1919, 1920, and 1921; locomotive fuel consumption during the years 1919, 1920, and 1921; also origins (p. 449) of locomotive fuel, together with the weighted average length of haul during the same period. 1758 That is a transcript of information furnished by the two railroads, the Norfolk Southern and the Seaboard Air Line. It was compiled under my direction.

This statement was offered and received in evidence as Exhibit No. 15.

Next is a statement showing bituminous coal mines owned or leased by common carrier railroads, based on reports made in July, 1921. That was compiled from answers furnished by the carriers to the car service division of the American Railway Association. (P. 450) It was prepared under my direction and is correct, so far as the information is available; but I can not say that that includes all the ownership of coal mines by common carrier railroads. It was the best I could do.

This statement was offered and received in evidence as Exhibit No. 16.

Next is a statement showing the extent to which the uniform mine rating and coal car distribution rules carried in car service division circular C. S. 31, revised, were effective on bituminous coal loading railroads during the years 1920 and 1921 and up to July 22, 1922; also the extent to which other rules governing coal car distribution to mines were in effect contemporaneously. (451) That was prepared from answers furnished by the carriers to a circular sent out by the car service division of the American Railway Association. It is correct, so far as I know. It is the best compilation

that could be made from the multitude of answers that came in. In some cases it required a good deal of squaring up of the answers to get the exact situation, and in some instances it was supplemented by correspondence. It is the best I could do with the information available.

This statement was offered and received in evidence as Exhibit No. 17.

1759 Next is a statement showing the extent to which assigned cars have been used by class 1 roads to protect railroads' fuel-coal loading during the coal-car shortage periods in 1920 and in 1922, up to July 22, 1922. The reason for that last date is that this information was asked for immediately after the close of the hearing in July and in anticipation of a (p. 452) further hearing then set for August. Subsequently we have asked for information with respect to the rules in effect now—that is to say, during October—and that has not yet been gotten together, but is in process of compilation. That is a correct statement, so far as it goes.

The statement was offered and received in evidence as Exhibit No. 18.

C. H. Markham was thereupon called as a witness, and, having been first duly sworn, testified as follows:

Direct examination by Mr. Fletcher:

I purpose to direct my testimony to the matter of assigning cars for railroad fuel and to the use of private-line cars.

I was for 25 years with the Southern Pacific, in various capacities. I was out of the service for six years, in the oil business; came to the service of the Illinois Central eleven years ago last January, and have been president of that company since, except for the interval during the war, when I was connected with the Railroad Administration, first as regional director at Atlanta, and latterly as regional director in charge of the Allegheny region, at Philadelphia.

(P. 454) The Illinois Central Railroad originates coal in considerable quantities.

1760 From 1906, at the time of what from my standpoint I would call the adoption of the Fraer rule, until the railroads were taken over by the Government, January 1, 1918, there does not seem to have been any very special trouble in getting along with the matter of assigning cars for railroad fuel.

Following the appointment of the fuel administrator, and, later on, the taking over the railroads by the Government, an understanding was reached between the Fuel Administration and the mine operators that, in consideration of some slight adjustment of the price to the purchaser of coal, the Railroad Administration would not claim the right to assign cars (p. 455) for its fuel. That rule was observed until after the armistice, following which, there being no longer a shortage of cars, the practice of dividing up the railroad business of the country—that is to say, the coal purchased by the Government for account of the Railroad Administration—was adopted.

In 1920, during the time of the car shortage, as I recall it, the Interstate Commerce Commission took charge of the matter and established what we know as the six months' rule. The expiration of that order disposed of the question of assigned cars for the railroads, for the time being, at least.

I am speaking now of the practice in the Central territory—that is, in the territory served by the Illinois Central—and I propose to confine what I have to say to the conditions in that territory. There are three classes of assigned cars: Private cars—that is to say, cars of private ownership—owned by those engaged in commercial business; foreign-railway fuel cars, cars sent to other roads on which the mines are located, to (p. 456) be loaded with coal for the owning road; and cars furnished by system lines to mines located on their roads. Those three classes of cars are not used on the
1761 Illinois Central to a very large extent; but as to a certain class which is of importance to us, the United States Steel Corporation, with some of its subsidiaries, owns mines served by the Illinois Central. These mines are served by cars of their ownership. To the extent that that sort of thing is permissible, it increases the car supply on our line. I mean to say that it increases our earnings from the carriage of coal. More coal is moved from points on our lines than could be moved if these private cars were not furnished.

The same thing is true to a degree of cars sent by other lines for loading on our line. They send cars to us, and we haul them to mines on our line, and they are loaded and returned to the owners.

The most conspicuous instance of a railroad that has no mines on its line and sends its cars to us, I would say, is the Great Western, a road which has no coal (457) on its own line. Another case is that of the Soo Line. It has none on its own line. It is a benefit to us to have their cars sent to us. It certainly is of great benefit to a railroad to be able to make reliable arrangements for its supply of coal and for the use of cars under those circumstances. I take it that that does not interfere with the mines, because those cars are in addition to those which would otherwise be furnished.

The subsidiary of the United States Steel Corporation has been using these cars on the line of the Illinois Central for about five or six years. If it is not argument under the rule laid down by the commissioner, I would like to say that the same right of use of a private car by its owner ought to be accorded as is accorded for the use of another car—an oil car, a poultry car, or any other sort of special equipment that is required—as long as it is confined
1762 to its own business and does not conflict with the rights or privileges of any other purchaser.

(458) I did not say that it was to the advantage of the coal operator to have foreign-railroad fuel cars come onto our road. I said it was of advantage to the railroad and to the purchaser of the coal. If I may give my reasoning on that, the United States Steel Corporation comes down on our railroad and buys a mine. They go

into a territory where there are no other mines at all, and they develop this mine and furnish cars and send them down to our railroad to handle the business. That is certainly in our interest, because it increases the number of cars coming onto our line and the amount of tonnage handled.

I will say this also, that, if those private cars were not furnished and we were required to furnish them all, the United States Steel Corporation would be entitled to its proportion of cars, and to that extent all the rest of the operators would suffer a diminution under the rating prescribed.

(P. 459) This foreign railway is under no obligation at all under the practice to send cars on our line for commercial loading. That is not done. If the output of the mine is taken for 30 days, we furnish the cars for that time; that is, the cars of railroad ownership.

By Examiner Barth:

The mine which supplied this foreign railway with fuel would not, in addition, get its pro rata share of cars for loading.

(P. 460) On our railroad our cars are almost entirely of the gondola type. They are not cars with hopper bottoms, so arranged as to discharge all the load. The Steel Corporation has built a type of hopper-bottom car, not specially differing from the usual type, but a very excellent car and a car which discharges one hun-
1763 dred per cent of the load. They have facilities for the use of such cars. If they were required to take pot luck with everybody on our railroad and be furnished with their pro rata share of the cars available, they would get a larger percentage of gondolas than of any other, and the cost to them of discharging coal would be increased. This is true of the foreign cars used by the Great Western.

As to the Great Western, while it has a limited number of cars, the larger number of its equipment consists of hopper bottoms, which are required for its special use in handling their fuel, and they have also provided themselves with facilities for unloading the cars into receptacles that elevate the coal for direct delivery to the engines under conditions where, if they had to take pot luck (p. 461) they would be given a very much larger percentage of gondolas than of hopper bottoms.

By Commissioner Aitchison:

The compensation we pay private car owners is on a mileage basis. My recollection is that it is 1½ cents a mile. That is on the private lines. But on cars of railroad ownership we pay the regular per diem of one dollar per day.

The Illinois Central owns all the stock of the Madison Coal Corporation, and the Madison Coal Corporation produces anywhere from 60 to 75 per cent of the requirements of the Illinois Central. They are operating eight mines now located in southern Illinois and along the St. Louis Division. (P. 462) Two of them are

between Springfield and St. Louis. The others are down in Williamson County and some in Kentucky.

As to obtaining the balance of coal that is required by the Illinois Central, we make our purchases usually—we make some seasonal output contracts. We make other contracts for 30 days. In times of car surplus, we buy from time to time as needed and sometimes, perhaps, to meet the convenience of the shippers.

1764 There would not be the same incentive for railroad-owned coal mines if they could not furnish freely the equipment necessary to move the output of the mine when needed for railroad use. The Madison Coal Corporation does not sell any of its coal commercially. All its coal goes to the Illinois Central.

The result would be that in times of car shortage—which, under the conditions which are obtaining here, means (p. 463) a coal shortage—the Illinois Central would have to pay more for its supply of coal than it does under existing conditions. How much more is a question I could not answer. That would depend upon the exigencies of the occasion, such as the demand for coal and conditions of supply.

There are a number of reasons why it is desirable to permit the assigning of cars for railroad fuel. There would be no certainty of supply of coal for the roads in times of car shortage. It would lead, as it always has, to a great many inconveniences to the public, in the way of confiscation of coal. The road must be operated. It must have coal for its engines; and, if it can not get it through the regular sources of supply, it must take it wherever it finds it. (P. 464) That has always been the custom, and I suppose that, in the public interest, it is a custom that will continue to obtain. There are other questions, practical questions, surrounding the use of coal furnished at different localities. Our engines, for instance, have to have a certain adjustment to burn coal produced in the Birmingham field, an adjustment differing quite materially from the adjustment which is made for the use of coal from the Illinois fields. Again, the Illinois fields, themselves, present difficulties in that regard; the Williamson County coal being of a different burning quality from that produced in the Springfield district. Now, these are practical matters that have to be taken into consid-

1765 eration. It is, therefore, important that we be given as nearly a continuous supply of coal from these regions as possible. Again, it would be forced to take the coal from wherever it could find it and probably increase the haul, and thereby increase the cost to the railroad. On the question of the ownership of mines, there is always the question of the certainty of supply. Take a railroad like the Chicago & Great Western for example. I speak of that because, in our case, that is one strongly (p. 465) in point. They reached a condition where it seemed to them absolutely necessary for them to acquire the ownership of a mine in order that they might be assured of a supply of coal at reasonable cost. Since they

have owned that mine and have been permitted to furnish their own cars, they have had no special difficulty in taking care of their requirements. The president of that road has very often spoken to me about it, and has told me of the great advantage which has accrued to them because of the ownership of the mine.

It is not practicable to buy spot coal in case all other means of supply failed. At times of coal shortage, the supply of spot coal does not come anywhere near being large enough to take care of the requirements of the roads at such times. If they did that, the effect would be to send prices sky high, not only for the railroads, but for the commercial users as well. As to the evils of confiscation a commercial user makes his contract for coal, requiring that a certain number of cars be shipped each day, week, month, or whatever the case may be. A consignment of coal (p. 466) starts to him. He is advised of the date of shipment. He has the bills of lading, and confidently expects that within a certain time the coal will be received. The next thing he hears is that some railroad has taken it. He may be hunting for his coal and expecting it to
1766 come all the time; and in the meantime it has been used by some railroad in the essential operation of its trains. It seems to me that that is opposed to the public interest and does not do anybody any good.

In the operation of the Madison Coal Corporation's mines we find this: Because of our ability to assure the miners of a certainty of employment throughout the year, and because of the fact that we are particular to supply them with good living conditions, houses to live in, looking after the sanitary arrangements and things of that sort, we have gathered around us a very dependable lot of men. Now, that is not happening every day; that is to say (p. 467), men are not leaving the surrounding mines every day to come to us, but that is a thing which occurs in a large way at the beginning of the season. It is known that these mines are in position to be operated continuously, and we are able to attract miners to our service. They come to us at the time we want them; they start to work, and they stay there. We are not constantly drawing men from these mines because of the fact that we are giving them steady employment. This last is one of the reasons for criticisms which have been made of the practice, because it is said to disturb the labor situation and ultimately affect the cost to the public. My observation leads me to say that our experience and the experience of the Madison Coal Corporation has been that that does not materially affect the labor situation. I want to say, again, that it is not a question of these men moving from the mines every day. They move once. We fill up the roster of our employes, and then the thing stops. There all the men available are distributed among the other mines. One of the great difficulties in our situation is that, according to the statement issued by the Illinois Coal Operators' Association, there

1767 are 72,000 men employed, where 42,000 men would take care of the entire output of the mines of that section.

(P. 468) A document entitled "Illinois Miners' Earnings, 1920-1921," prepared by the Illinois Coal Operators' Association, was offered and received in evidence as Exhibit No. 19.

(P. 469) The point that I want to make is that if, according to this statement of the Illinois Coal Operators' Association, there are 72,000 men employed in the mining industry and only 42,000 are required to furnish the amount of coal produced, so far as the Central field is concerned it cannot be possible that the making of output contracts by the railroads or the furnishing of private cars, either for private industries or for the use of other railroads, would have any material effect on the question of labor supply in that territory. I do not vouch for these statements, but I take it that they are authentic, being from the Illinois Coal Operators' Association and very carefully prepared for a special purpose.

From the public standpoint, (p. 470) it is infinitely more important that the railroads be permitted to obtain a regular supply of fuel under conditions that do not directly interfere with the public convenience than it would be to depart from the present practice—and I speak now of the Central field only, wherein the minimum time that we make contracts for railroad fuel under agreements to assign cars for that purpose applies—it is infinitely more important to the public that that practice be continued than that we depart from the assigned car privileges that we now enjoy, and be required, from time to time in periods of car shortage, which means a shortage of coal, to resort to the indiscriminate confiscation of commercial coal in order that the railroads will be kept running and enabled to move any business at all. From the standpoint of the conditions in

1768 the Central competitive field, it is not a question affecting the public interest, because that is the effect of the labor supply. One of the difficulties of the mining business is that there are too many men depending upon it for occupation. However that may be, as long as that condition continues, certainly no one can complain that the public interest is adversely affected because of the alleged advantage sustained by certain mines in the way of obtaining a continuous (p. 471) supply of labor, to the disadvantage of other mines, because of the assignment of private cars either for private use, railroad use, or the assignment of cars for the loading of coal for use on the system.

Cross-examination by Mr. BALLARD:

The Illinois Central recognizes its obligation under the present practice of furnishing the cars that are necessary to take care of the business originating on its line, subject only to the requirement of the lines to which this equipment is delivered that they return that equipment without misuse. (P. 472) What we recognize is the obligation, under these conditions, to furnish the cars necessary to take care of the business originating on our line, subject to the

proper use of those cars by the line to which delivered. The custom established is the obligation of the road to furnish the cars necessary to take care of the business originating on its line. Now, if because of the competition or other conditions we can prevail upon connecting lines to put into service a part of the equipment, that is another thing; but I know of no way to do it. (P. 473) Connecting lines furnish no cars now for commercial coal, but do for their coal. (P. 474) The Illinois Central burns about five million tons a year. We figure roughly on about 250 cars a day—from 250

1769 up to 300 or 320. Just now we are using our maximum. The Illinois Central serves 175 commercial mines according to the last figure I remember seeing. I suppose it is now about 200 all together. If we could get as many as two cars per day from each mine we serve, our fuel supply would be amply met. If we took fuel from all the mines on our line, I think it would result in a longer haul. We use coal at all division points. (P. 475) The mines on our line are confined to southern Illinois and western Kentucky. We serve no Alabama mines. I cannot tell how much the haul would be increased. We buy no coal off our line. I regard the ownership of mines by carriers as essential to the protection of their fuel supply. I do not know how many class I carriers own mines. As to whether the practice of assigning cars for railroad fuel is merely expedient or necessary, that depends altogether upon whether you are dealing with the situation in a period of car shortage or not. When cars are plentiful, everybody gets all the cars he wants; but when it comes to times of car shortage, then is when the shoe pinches. Then it becomes necessary for the railroads, in their own interest and the public interest, (p. 476) to get an adequate supply of fuel. I think it is necessary, in the interest of the public and of the carriers, that the roads be supplied with a continuous supply of fuel. As to getting a continuous supply of suitable fuel which would move only reasonable distances to the points of use during periods of car shortage, without the use of assigned cars, you could get it in two ways: by confiscating, or by paying whatever price was asked. We had that experience during the coal strike. We all know what happened to prices in certain sections of the country.

1770 (P. 477) By Commissioner Aitchison:

If the railroad has to pro rate its fuel supply needs with every mine on its line, there is no human possibility of a railroad purchasing agent satisfying himself on the point whether every mine is going to operate 365 days a year. As to spreading our contracts, the only experience we have ever had in that regard was during the Railroad Administration, following the armistice, when, at the request of the leaders of the United States Mine Workers and also of an important (p. 478) body of operators, the Director General required that the business of the railroads be split up. That is some time ago; but I have a very definite recollection of the fact that during that time orders for coal, placed under the conditions you

have outlined in your question, resulted in the railroads failing to get the supply of fuel that they had a right to expect they would get under this arrangement. The contracts were not lived up to. I do not mean to criticise mine operators as a class, but there are all kinds of people engaged in the mining industry, just as in any other industry; and it does not seem to me that it would be reasonable to expect a railroad to go in and make contracts, based upon its ability to perform a public service, with every man who happened to be engaged in the coal mining business.

(P. 479) I do not know whether the practice of purchasing coal from a limited number of mines without assigned cars is in effect on western lines. As to buying coal off our line, I am not familiar with the conditions in 1919 and 1920, because at that time I was with the Railroad Administration. I will say that we did buy a limited amount (p. 480) this year, down in Alabama, that may have come from short line connections. But that is very limited and is not our practice at all.

1771 By Mr. ROBERTS:

In the case of the steel company the cars which are used for their coal are cars which are owned by the steel company and used for the steel company's business exclusively, or one of its subsidiaries. In the case of cars which are sent under the Great Western contract or in the case of cars which are assigned by us to mines for our company fuel, those are cars which are used indiscriminately, whether for this purpose or for public purposes at various times. There is a distinction between the private car of the steel company and a car which is thus impressed with a public trust, for the use of the public, which the railroad owns. My answer should be qualified by saying that in the case of the Great Western cars it would not be impossible for them to assign those cars to the service of contracts on its lines. They could assign their own cars, and we would respect that assignment and keep the cars in that service.

(P. 481) As to whether it is a custom of our line, or other carriers, to credit the cars which a railroad furnishes for its own fuel on our line on the balance which is due our (p. 482) line in the return of cars, as a practical matter, it has nothing to do with it at all. My understanding is that the integrity of the cars delivered to us by the Great Western is preserved, and that those cars are taken to the mine and loaded. I know it is the custom of the Soo Line. I do not know anything as to the custom with other railroads. The integrity of the steel company's cars is maintained. I do not recall any other coal cars that are handled for a private company, except the Louisville Gas & Electric Company. It has either twenty or forty. They are shuttled back and forth. Their integrity is maintained.

1772 (P. 483.) I do recall, broadly speaking, that it was the practice in former years for the Illinois Central to purchase its coal from operators under a maximum and minimum contract

and to supply its needs in that way. As to the effect of taking mine employes from one mine to another, because it was a permanent matter and not just from time to time, it might in case of contracts we have made for thirty days, affect the situation at some adjoining mine during that 30 days. It might have some effect on it. But I was making the statement, in that same connection, that because of the over-supply of mine labor, it could not be really a practical question. If, as set forth in this pamphlet issued by the Illinois Coal Operators' Association, there are 72,000 men, in fact, employed and only 42,000 required to produce all the coal needed, then it does not seem to me that any movement which might result from placing railroad contracts under conditions which exist would affect materially the labor situation in that territory. (P. 484.) This pa[illegible]et shows that some mines worked a great many more days than others.

By Mr. BROWN:

As to the number of cars of coal we consider that we must have on hand for current use, we are now using about 400,000 tons a month, and I think that, to be amply protected from all the difficulties following unexpected storms, wrecks, strikes, etc., a railroad like ours ought to be permitted to keep at least a 20 days' supply of coal. During the winter season, like everyone else, we have to figure on a very much larger supply than that, due to the difficulty of transportation, the desire not to encumber the road with the movement of company freight at a time when all its resources (p. 485) ought to be devoted to the movement of commercial freight, and at the same time
1773 protect it against all the exigencies resulting from bad weather and all that. We try to store for the winter, ordinarily, somewhere between 30 and 45 days' supply. We store it in piles. In getting it from the piles we load it in cars, under exactly the same conditions which obtain when we get it from the mine. It is not a fair conclusion that there are 5,000 cars under load by the Illinois Central all the time for its coal. When I said "a 20 days' supply," what I meant was that it should have that supply on hand—not in cars. In times like these, we load every car that is not needed for immediate use. The service that we render to the steel company and others on our line is not a special transportation service. (P. 486.) I do not think it is under a wheelage contract. Maybe we have; but, if we have, I have never heard of it. I would see no necessity for it at all. I would be very glad to have them come to us and say that they were opening a mine on our road and that they would give us a certain tonnage a year if we gave them cars.

By Mr. BALLARD:

(487.) I do not understand that our railroad mines have ratings the same as commercial mines. I understand we take the output—I do not think the distribution sheets show the particular number of cars a day at our mines. (P. 488.) I do not know whether or

not that is a common practice in the Middle West. I know nothing about the practices on other lines. (P. 489.) I do not think it is true that cars have been offered unloaded and in large numbers at our own company mines when commercial mines on our lines were without any cars for commercial distribution. I should severely criticise any officer of the Illinois Central that would be guilty of that sort of thing; but since we made last month 42 miles a day on freight cars, I think you will find that there could not have
1774 been much misuse of cars on the Illinois Central Railroad. I would be glad to have an opportunity to look into the matter. I would say, on general information and belief, that there are plenty of officers here who would say that it is not true. (P. 491.) If the assigned-car rule were abolished and the Madison Coal Corporation would get only 2 cars a day, I can not conceive of the Illinois Central being able to afford to own and control the Madison Coal Corporation, which now controls six mines, because, whether it be unlawful or not, it is not the policy of the Illinois Central to engage in the commercial business; and not being permitted to engage in the commercial business, certainly two cars a day or three or four cars a day would not give these mines a sufficient allotment and an output of coal to enable them to live under that condition.

(P. 492.) There are all kinds of working conditions at different mines that attract or repel the supply of labor. But the point that I am trying to make in that is that that is not a fact of continuous occurrence. It may affect a property, does affect adjoining mines at the beginning of the season, but it is not happening every day. A mine does contract for a continuous output on a certain basis and is able to make arrangements for labor at a certain time, and under those conditions it is able to surround itself with perhaps a different class of labor than under conditions where men are intermittently employed. That is one of the things that enters into it. So I am not admitting that it works to the detriment, altogether, of adjacent mines. (P. 493.) Our superior labor supply is continuous rather than spasmodic. I do not know how many private cars of the United States Steel Company for coal supply are on our line. There may be a thousand; there may be as few as 500. I think you might call the service they get a shuttle service. These cars are delivered to us by
1775 the E., J. & E. at the junction with the Illinois Central Railroad by trainloads, and the coal is loaded and returned to us in trainloads. The conditions of receipt (494) and delivery of the empty cars and loaded cars are such that it is very much to our advantage and to the advantage of economical operation to handle them in what you call the shuttle service.

By Mr. Cranv:

Private cars are desirable from the standpoint of bringing us business that we would not otherwise have, and because it reduces the necessity of the railroads furnishing themselves with equipment to

take care of the gross volume of business that cars are required to take care of. (P. 495.)

It is substantially correct that private cars of the steel company were handled in trains containing steel company cars alone. But it is not because of any desire to give the steel company any special advantage in the handling of these cars, but it is a matter of economy in the operation of the railroad. It is the most economical way, broadly speaking, certainly under the conditions that happen in the handling of the equipment that is received from the steel company through the E., J. & E. that goes to the Middle Fork mines.

As to whether we had a locomotive shortage during the strike, if you measure it by the amount of business we were called on to handle because of the general disability of the railroads of the country, I would say yes; but if measured by the responsibilities of the railroad and by the amount of traffic that they had previously been called upon to handle, I would say no. As to whether the practice of handling private cars of the steel company, in trainloads, tended to absorb the motive power and in that way to take it away
1776 from the ordinary commercial operators and shippers, it is (p. 496) an infinitesimal part of the operations of our railroad. I do not know whether or not it is an infinitesimal part of the operations of some of our neighbors.

The Illinois Central assigns foreign railway fuel cars to the mines according to the billing from the foreign line of those cars under the ruling in the Hocking Valley and Traer cases. I do not know whether or not some lines in the West do not assign their cars for foreign railway fuel.

(P. 498) Many contracts were entered into since the first of last year for railway fuel coal by our railroad. I do not know the nature of those contracts. I would say they were uniform in character as to conditions other than price, because that is the established policy. I do not know whether the contracts had any clause with respect to car supply, but I do know that when we contracted for the output of mines we did agree to take that output, and that, of course, carried with it the necessity of supplying the cars. A search will be made to see if there is anything in writing with respect to that. (P. 499) If no shortage of coal is anticipated we would not under those conditions contract our full supply or full requirement as closely as we would under conditions where we anticipated shortage of coal. As to whether the element of car supply may have an effect upon the price the element of price enters into it just the same as it does in buying any commodity that is used by the railroad. Naturally, if you anticipate a shortage of an article in the future, you try to guard against the consequences of being short at the time you need the stuff, by making your contracts in advance; and that same argument, I think would apply to the purchase of coal just as it applies to the purchase of (p. 500) ties or rails or any of the other various commodities used in the operation of a great railroad.

I would think a promise by the railroad to furnish a full car
1777 supply would be one of the circumstances that would influence the operator in entering into such a contract, because upon his output and quantity and all that, and continuity of employment of his men would depend his profits. As to whether this practice has the effect of allowing the carrier to use its car supply to buy coal, it may be a not inconsiderable element in that regard; but so is the ability of the carrier to move ties an element in the matter of the price it pays for its ties. We may be short of cars for the movement of lumber in the territory served by our rails. Yet nobody has ever questioned our right to furnish the number of cars necessary to move the supply of ties required for the operation of the railroad from time to time. It may be that the ability to take care of the business, to receive it from the seller, and under the conditions of stability it means he gets his money at a certain time—all those things. It may be that it does enter into the question of price. It would be strange if it did not; and I would not like to sit here and deny that it has some sort of effect. I do not know whether or not in those contracts covering ties and rails, the guaranty of a full car supply is written into the contracts. I do not think it ever occurred to anybody that it was necessary to do it. Nobody does that.

Many public utilities secure coal from mines on our line. I do not know of any instance in which they assign their own cars for this coal, except (p. 562) that the Louisville Gas Company owns its own cars in sufficient number to take care of its own requirements, I understand, from its own mine, and that is the only instance. As to why it is that the public utilities are enabled to secure a sufficient amount of coal, they have done it in times car shortage in the past, I think, by grace of priority orders on the part of the commission.

They are doing it now by virtue of the same condition, if I
1778 understand the situation correctly, to the extent that it is necessary at a time when there is more talk about the shortage of coal than a real shortage, practically.

(P. 563) (A copy of a letter written by the purchasing agent of the Illinois Central was offered and received in evidence as Exhibit No. 20.)

I do not know whether or not the public utilities have a cost-plus contract that they enter into with coal mines, I am not familiar with that.

I doubt very much whether it will be an incentive to the railroad to have a larger car supply and to serve the needs of the public more satisfactorily, if the assigned-car rule were abolished and railroads should not be permitted to assign cars to company-owned mines. I think from the standpoint of the railroad mana-
1779 gers of his country it is the desire to serve the public interest in so far as the financial conditions surrounding (p. 564) the obtaining of money for the purchase of equipment and the development of the other facilities necessary to increase the capacity of the

transportation machine, all in the public interest and in the interest of the properties that they represent, is already so great that it could not be possibly influenced by any such consideration as a change in the methods of the purchasing of fuel and handling it, or the improvement in conditions which might result from the purchase of more cars, additional equipment and all that. I do not think that would material at all.

During the period that service order No. 23 was in effect the railroad continued to take the output of the Madison mine for the use of the railroad just as it had been doing. (P. 505)

Q. (By Mr. CURRY.) That order reads, in part, as follows:

"(a) For fuel for railroads and other common carriers and for bunkering ships and vessels.

"(b) For public utilities which directly serve the general public under a franchise therefor with street and interurban railways, electric power and light companies, water and sewer works, ice plants which directly serve the public generally with ice or supply refrigeration for human foodstuffs, hospitals.

"(c) For the United States, State, county, or municipal governments, and for their hospitals, schools, and for the other public institutions, all to the end that such common carriers, public utilities, quasi-public utilities, and the governments may be kept supplied with coal for current use for such purposes but not for storage, exchange, or sale.

"(d) Bituminous coal which has passed over screens four inches or larger openings, coke and anthracite coal to be shipped to retail dealers for household use.

1780 "NOTE.—It is not intended by this paragraph to give any priority as between clauses (a), (b), (c), and (d) hereof."

That is from amendment No. 1 to service order No. 23, dated August 4, 1922.

Did the Illinois Central construe that paragraph as permitting an assignment of cars to the Madison mine?

A. I so understand it.

Mr. FLETCHER. * * * generally speaking, I think it is true that during the life of service order 23 the Illinois Central took care of all of its No. 2 priorities, which would make the assigned-car rule, as I understand it, of no consequence. In other words, if it was able to take care of the No. 2 priorities of course one of those priorities would be cars for railroad fuel.

(P. 507) I do not understand that during that period private cars of the United States Steel Company were used in any manner differing from their use either before or after.

FRANK HOOKER ALFRED was thereupon called as a witness, and being first duly sworn testified as follows:

Direct examination by Mr. BILLS:

(P. 508) I am president and general manager of the Pere Marquette Railway Company. I have been engaged in the railroad

business and profession for upwards of thirty years with different railroad companies. I was five years with the Norfolk & Western, two years with the Hocking Valley, four years with the old C., A. & C. Railroad, a division of the Pennsylvania, and I have been with the Pere Marquette and associate lines for about twenty-one years, with an interim of three years during that period that I was in another business. During Federal control I had charge of the operation of other Michigan roads than the Pere Marquette, namely, the Grand Trunk Western, Ann Arbor, D. & M., Shore Line, and
1781 several other small roads, the D., B. C. & W., in connection with the Pere Marquette. I have some general familiarity with the situation as to fuel coal on the Michigan roads. My testimony will deal with the subject of assigned cars.

The Pere Marquette Railway Company operates something (p. 509) over 2,200 miles of road, of which over 1,800 are in the State of Michigan. The operations extend from Chicago on the west to the Niagara frontier on the east, and from the west ports of Lake Michigan, Milwaukee, Manitowoc, and operations by boat through Ludington to the Niagara frontier; operations through the Toledo gateway into Michigan and beyond to the Northwest by the boat lines.

We consume a little less than a million tons a year, on an average; approximately 900,000. The Pere Marquette Railway buys most of its fuel from the eastern Ohio district and Kentucky district, West Virginia, some from Pennsylvania. It all comes to us through the Toledo gate excepting the coal from Pennsylvania, as to which we ferry the cars to Rondeau, a Canadian port, for use largely within Canada. Our Ohio coal comes from the so-called Pittsburgh No. 8 district, eastern Ohio fields, and our West Virginia coal from Logan County, largely from the Island Creek productions there. (p. 510) In times of stress we purchase coal in Indiana and Illinois, but we aim to contract our coal in the fields above mentioned. The Pere Marquette uses Michigan coal for locomotive fuel to a very slight extent. The entire production of coal in Michigan is something like 1,200,000 tons, of which possibly half is mined on the Pere Marquette road. It is a little lighter coal than is good for steaming purposes. It is best adapted for commercial use, such as for houses, and so forth; and we aim not to use that coal except in emergency. I presume we do largely like most other roads that do not have the mines located on their own lines. We send out invitations to
1782 all of the coal producers that we know of, usually several hundred. I think last year our invitation was sent out to something like five hundred operators. Bids are taken from all of them under a standard specification, and they are gone over and those gleaned out that we consider the most advantageous, taking into consideration (p. 511) the quality as well as the price of the coal, and it finally results in our contracting with possibly four or five or half a dozen coal companies for the requirements for the year.

We use from 45 to 60 cars a day. It would not be practicable to distribute our patronage on fuel coal around between 30 or 40 or 50 mines so as to get one or two cars a day from a mine. We could not depend on such an arrangement. Whether or not it would be true if you did that instead of select ng the five or six best bargains that are offered to us, we would necessarily have to include some of the worst bargains. Naturally we would have to contract with some roads whose proposition is not as favorable as the ones we contract with. In times of car shortage we could not get an adequate supply of fuel coal for the Pere Marquette if we had no assigned-car rule. I have here a statement in explanation of this answer.

(P. 512) On this statement we show the operations of Short Creek mine No. 1, Adena, Ohio, No. 8 field. It indicates how the Pere Marquette Railway Company obtained its fuel coal from the mines during the months of May to November, 1920, through the use of assigned cars, and what the situation would have been had no assigned car rule been in effect to help out the situation. You will note the actual rating of the mine, given in tons in the first column, and that under the (P. 513) assigned-car rule we received 95.77 per cent. That is the average during the period May to November, 1920. In the fourth column it shows that we would have received 70.9 per cent if we had had no assigned-car rule as against 95.77 per cent actually received.

1783 (This statement was offered and received in evidence as Exhibit No. 21.)

This mine is located on the Wheeling and Lake Erie. As another instance during the (p. 514) period from July 9 to October 21, 1922, the Pere Marquette Company had a contract with the Island Creek Coal Company operating in Logan County, West Virginia, by which they agreed to ship coal at the rate of 25,000 tons a month. The mines of the company are located, as I said, in Logan County, West Virginia. During the period they actually shipped 31,400 tons, which amounted to approximately 36½ per cent of the contract tonnage. I had an investigation made of the cause of their failure to supply us with coal as they had agreed to, and found that during the period the mines in Logan County produced only 25.6 per cent of their mine rating. This failure was due in large part to transportation troubles, inability to get cars for coal and inability of the carriers to handle the cars promptly. Our investigation did not leave any doubt in our minds that the assigned-car rule would have been of very great assistance to us in securing our fuel coal from this territory. This was in September and October, 1922. We did not have any assigned-car rule with those mines.

If we fail to receive coal under our (p. 515) regular contracts, we are obliged to go out in the open market and buy spot coal to protect our requirements. We would confiscate if it became absolutely necessary. We do not confiscate coal; I do not think we confiscated a car this year of coal. We make it very rigid about

confiscating coal. If there is any other way to get it, we get in in that way. We did in 1920; we confiscated quite a good bit of coal. The assigned-car rule was in operation in 1920, but there was a period there that we were obliged to confiscate some coal, quite a little. We could not get our coal through. It was a question of either shutting down or taking some coal, and we did
1784 confiscate. We tried in cases to take it up with the consignees in advance to see if we could not make an arrangement with them, which we did in many cases, to take some of their coal. (P. 516) Our contracts run for a year, our contracts in 1920. 1920 was the year we did not have the contract; that was the year we took our property back, March, 1920. We had contracts, but we did not have enough contracts to protect us. Those contracts were for the entire output only in this way, that with one or two companies where they operated more than one mine—for instance, one company operates fourteen mines, and they, as I recollect, tried to confine us to one contract with those mines to give us the output of two of those mines, but it was optional with them; they could supply it from any one of the other mines. As to whether our difficulty in getting our coal in 1920 was because we had not contracted for the subsequent months, I think there were other complications entered into that. On March 1, 1920, we took our property back in toto. We had been going on under the protectorate of the administration, and we had the switchmen's strike that came on in the following month, right after that, and everything was tied up from the period of April 1st until about June, about the end of June (p. 517), and business was not moving anywhere. We had great difficulty in operating at all during that period.

This mine in West Virginia with which we have a contract this year is not an entire-output contract. That is the same as I have spoken of. They operate fourteen mines in Logan County, West Virginia, in which they confine us to the output of two of those mine—two of the fourteen. We have contracts in eastern Ohio, where they give us the entire output of a single mine. That is in the Cambridge field on the Baltimore & Ohio. We aim to contract
1785 for complete mine outputs; we like to do that. During this period, when we had to buy a good deal of spot coal and confiscate coal, the cost of the spot coal that we purchased and of the coal we confiscated was very much greater than our contract prices that were currently in effect. During the period of April 1st, 1920, to November 30, 1920, during that severe fuel shortage that we were discussing we received on contract 640,550 tons at $3.25 per ton f. o. b. mines. We were obliged to purchase some spot coal. We purchased 23,551 tons at a cost of $4.47 (p. 518) per ton f. o. b. mine. That was the year we confiscated a large amount of coal, which cost us $4.95 per ton f. o. b. mines. Therefore during the period of confiscating coal cost us $159,080 in excess of what the same tonnage would have cost us under the contract; and the spot coal cost

us $28,650 in excess of what and equal amount would have cost us under the contract. During September of this year [1922] we paid for 45,798 tons of contract coal at an average price of $2.57 a ton. During the same month we also paid for a substantial amount of spot coal which the recent conditions compelled us to buy, at a cost of $4.46 a ton. That is nearly $2 a ton more than the coal under the contract. We did pay as high as $9 a ton for some spot coal in September. We bought 57,445 tons of spot coal in September.

As to whether we paid more than anybody else for spot coal, I did not buy the $9 coal. The $9 coal was bought for me by the car service division in Washington. I would not have paid $9 a ton for any coal. When coal was worth from 75 cents to $1 a ton at the mines, as it was a few years ago, it did not make so much difference; but now when we are paying such tremendous prices for our coal, $2.50 under contract, it does make a very great difference in our operating costs. Possibly we did not pay more that the coal was worth to others, because I would say that that is what fixes the price of the coal,
1786 its worth to the needers of coal. That is the mine price. We had a hundred cars of coal bought for us, as I have just stated, that cost from $7.75 per ton to $9 per ton at the mines. The highest price I paid for spot coal outside of that was, I think, the administrator's price of $4.85, being the Hoover price of $4.50 plus 35 cents. That was the highest price I paid, excepting in one instance where the Michigan Central Railroad turned over to me fifty cars of coal. Their price (p. 520) was something more than that. It was whatever it cost them that I was obliged to pay them.

By Commissioner AITCHISON:

This $7 coal was what we called "wildcat" coal. Maybe that is what you call "bootleg" coal. I suppose it is the same thing. But this coal was coal that the operators had available on the market for whoever would pay the highest prices. It was not priority coal. It was coal that came through as class 3 coal. As to why we did not buy class 2 coal, we were pinched very hard for a few days. We were expecting our coal coming up from the C. & O., but it was confiscated en route. We had one lot of 47 cars taken by one railroad, in one bunch, and another lot of nearly as many, and several roads took this coal en route, and I found myself on Friday night, near the end of the week, with not enough coal to carry me over Sunday. They might have done that with assigned-car coal. The railroads might have done the same (p. 521) thing; but in this particular case that was the reason I had to take the first coal I could get my hands on; and I may state that while we thought we had to take it, this coal that was bought for $7.75 and $9 a ton did not show up for about three or four weeks. So I did get through; I wiggled through by borrowing from other railroads, as I have just stated, and this coal finally came to us. The coal was, as I understand, in Cincinnati

at the time. I think I wrote the mine that we confiscate
1787 57,000 tons of this spot coal, which would include wildcat wi
the other. It was about, I should say, 150 cars of the highes
priced coal, all together $7.75 to $9.

By Mr. BILLS:

The confiscation of coal is not justified except in extreme emer
gencies. We did not confiscate coal if there is any other way of s
curing coal to carry on our business. It engenders an animosity
against the railroad by the shippers, and it is injurious to our busi
ness, and for that reason we try to avoid (p. 522) it.

It would not be practicable to secure our coal supply by the pur
chase of spot coal. We could not take care of the operations of ou
property by depending upon the purchase of spot coal. The fuel bil
on a railroad is the largest cost. It is the largest amount of any
supply that enters into railroad operation. The fuel coal on our road
amounts to 23 per cent of the total transportation costs on our prop
erty, and it amounts to half of that, or 11½ per cent, of the total ex
penses of our railroad. It is the biggest single thing entering into
the operation of the road. It is more than the cost of our rail and
ties combined. The prices of spot coal were always higher in times
of coal shortage. That is what sends the price up. It is [hard]
for a road like the Pere Marquette to buy spot coal, anyhow. We
cannot get at the coal. Not serving any mines ourselves, directly,
it is difficult for us to get our hands on it. The other fellow can
always get hold of it first. (P. 523.) We cannot advantageously
purchase for railroad fuel any coal you find called spot coal. Our
engines are drafted for a certain kind of coal, and when we have to
use another kind of coal it affects the capacity of the engines.

Three years ago or four years ago, the Pere Marquette purchased
a thousand all-steel hopper-bottom self-clearing coal cars. Those
were bought for the express purpose of taking care of
1788 our fuel requirements. Let me say that was rather doubtful
as to just how it would work out. We have had a great deal
of trouble with the railroads serving the coal mines in connection
with the supplying of cars for our fuel coal. The railroads serving
the mines have always taken the position with us that in times of
plenty when cars were in abundance, they would furnish their own
cars for sending the fuel coal to us. That being the case, there was lit
tle incentive for us to purchase cars for our own fuel coal unless we
could have an understanding with the roads serving the coal mines
that they would permit us to send ours cars for our coal during the
entire period of the contracts. I now, in contracting, always bring
(p. 524) up with the carrier that serves the mine and have an under
standing that we will be permitted to put our coalers, our hopper-
bottom cars, into this coal service for supplying our own needs, and
in case of emergency they will fill out by supplying their cars when
our cars do not reach them promptly. That thousand cars cost over
two and a half million dollars. We put in modern fuel stations at

all of our large terminals, a dozen of them, to enable us to use economically these self-dumping cars and avoid the necessary labor of shovelling coal. We either have an elevated trestle or have a hopper where we use these cars. We dump them into a hopper. If these cars are not confined to our fuel service and are taken off in other service and a miscellaneous lot of cars is turned over to us in place of those cars, that would be very expensive to our operation. It would always be expensive to the operations at the mines. It is much easier for the mines to handle a group of cars (p. 525) that require less switching than if they had a promiscuous lot, where a flat bottom would be switched out for one fellow and a hopper bottom for us. It costs about three times as much to unload a shovel car than to unload a hopper-bottom car. If we did not use those thousand hopper cars for our fuel service, if I was not able to
1789 effect an arrangement with the railroads serving the mines by putting those cars into the fuel service, I question very much whether we would be justified in owning the cars. It is good practice for a railroad to purchase equipment that is necessary to take care of the business that that railroad originates. For the Pere Marquette to own coal cars that can only be used on a foreign line would depend altogether, of course, upon the Pere Marquette's ability to secure that business over its rails. Business coming from the mines into Michigan might move over the Pere Marquette one month and over our competitors next month. The only justification for owning cars would be the per diem. I think we are all agreed that there is no profit made in owning cars for the sake of the per diem that the car would earn. The Pere Marquette does not undertake to supply to the coal roads the equipment in which commercial coal moves into the State of Michigan. Of the thousand hopper cars that we own and were practically assigned to our own fuel use, there is something over 300 of them that have gotten away from us and have gotten out into commercial service within the last two months. We need them back and I am trying to get them back at this time, but they are just at this time in commercial business.

By Commissioner ATCHISON:

About 1,000 of our 3,900 open-top cars are coalers. Our open-top use has increased tremendously in the last year or two. It is three times as heavy as it ever was before. It seems (p. 527) to have grown with tremendous volume in the State—the movement of gravel and sand. We do not have much lumber up there. Michigan lumber is pretty well over. It is mostly for sand, for moulding purposes and glass sand, and gravel for road building. There is a tremendous amount of road building going on both by the State and the various counties up there. They are all engaged in it very actively. We have no large shipments of steel. Those steel cars are loaded by
1790 other companies and usually are foreign cars. We equalize in cars—a road like ours is a box-car railroad, and most of our equipment is box cars, which are necessary for the particular

class of business that we originate in the State of Michigan; but in equalizing we do not equalize the different classes, whether it would be a flat or stock car or (p. 528) box car or gondola.

By Mr. Bills:

I think that there is an advantage from the viewpoint of operating efficiency getting the full use out of our car supply that is accomplished by the use of assigned cars. For example, during a time of car shortage, suppose we had a contract with a mine in West Virginia which called for delivery of, say, 20 cars a day of fuel coal. If we would deliver our connections those 20 cars per day, they would go down intact to the mine. They would be placed with one switching. They would come back together. There would be a great saving, I say, in the handling of the cars at the mine, an economy and also a saving in time.

(530) The reason we were not assisted by the assigned-car rule between April and November, 1920, as much as we ordinarily would have been assisted was the fact that we did not have fuel contracts to the extent that we ordinarily have. We came out of Federal control the first of March, 1920.

(531) We make it a practice to store coal every year and to use up every year the coal we store. We consider it bad practice to carry coal over. We aim to store coal before the seasonal movement begins of other business, usually getting our storage in by August—possibly the middle of July—and we store in the neighborhood of 100,000 tons, enough to carry us a month or a little more. Last year we stored practically 130,000 tons, about six weeks' supply.

1791 By Commissioner Aitchison:

All in storage piles.

By Mr. Bills:

We store it as a protection against the severe winter weather in Michigan. It costs us 70 cents a ton to store the coal and pick it up. If you stored coal and left it there through a winter and from year to year you would not have the coal. Coal deteriorates rapidly. We store usually a particular kind of coal—a heavy West Virginia coal. Lighter coals slack more rapidly, and we (p. 532) consider it good business each year to pick up the coal that is stored and not carry it over the second year. It would not be consistent with efficient operation, in my judgment, to store coal against a possible car shortage. We would only store to protect our operations from inclement weather, as a usual thing.

By Commissioner Aitchison:

If it costs 70 cents a ton to put coal in storage and get it out, on our consumption, that would mean $700,000 a year, which would come out of the pockets of the people. A railroad cannot store as industries do and can. As to public utilities, take, for example, a

our own home town, the Detroit-Edison Company, a very large consumer of coal. They can store their coal all within the confines of the plant, so that they make but one movement from the pile into the power house. Concerns of that kind can and do carry protection for possibly as much as three months. But with a railroad operating over (p. 533) 2,000 miles you cannot have that storage pile right at the place you take it on. That is where it should be, so that you would not have any back movement of the coal; we would not be required to stockpile every ton we use. The 8700,000 is our year's consumption. If we did not have any assigned-car privilege, the maximum amount we would have to store, if we were where
1792 any of us were and it was (p. 534) publicly stated in the hearing that we would be when we last met, facing a car shortage, would only be a guess; but I should think we would want to store at least twice as much as we did, at least 60 days' supply, costing about $100,000. We do not go out in the market and pay nine dollars and a fraction a ton. The $7.00 we paid was bought for us; $4.85 is what I testified we paid. We paid the Hoover price. I will not withdraw my testimony that I paid $9.00 for coal. I think my testimony is consistent. (P. 535) Those things do not happen regularly. It happened in 1920 and this year. Those are the two years when we had car shortages. When it happened this year, we had contracts for our coal. I made contracts the first of June last year for all the coal we required up to April 1st of next year. I made those contracts in the face of the strike. The mines were closed down, but I went ahead and contracted anyway, half with open mines and half with closed mines. I put half of it in West Virginia and half of it in eastern Ohio.

By Mr. Bills:

We would get along without buying spot coal or storing this excessive amount for sixty days if we had the assigned-car rule. (P. 536) It has not been my observation that railroads do buy their coal always cheaper than the public purchaser, industrials or the other consuming public, even under the assigned-car rule. I do not think that by having the assigned-car rule we necessarily profit over the other consumers of coal. I do think this: That the operators prefer to have assurance from a railroad that we will supply equipment; not that they be hammered down in price, but that they come to us and say, "If you will give us assurance of cars, we will name you a certain price for your coal." We take the same chance that every other purchaser does who contracts a year in advance for coal. I have some cases here, which cover the last three years, where I could have bought coal cheaper than our contract price dur-
1793 ing a portion of those years. I have the details of them here, if you care for them. In 1920 (p. 537) I made a contract in the Pittsburgh No. 8 field for 10,000 tons a month, covering a period of six months, at $8.00 a ton. During a part of that time I could

have bought that coal at $1.75 a ton—that is, during a considerable period of the time. I had a case just this year, on our last year's contracts, where we had our coal bought for $2.60 a ton; and in the months of January and February and up into March I bought some of the same coal as low as $1.50. It just happened that the market was flooded with coal, and I could buy it for less than our contract price. I was obligated to take the coal up to the amount contracted for. I feel that, taking it as a whole, year in and year out, I could get, by contracting in advance, a better price. I think we are at a very great disadvantage as compared with roads that serve the mines directly. We have no means of reaching the coal, as have (p. 538) the roads that serve the mines; no means of compelling the operators to supply us with coal, except as they see fit to do it under the contract. We have no way of getting hold of it. For example, during the coal shortage in August and September, this year, we were getting coal from the Wheeling & Lake Erie Railroad and from mines located on the Pennsylvania. We did not get from the mines on the Wheeling—that is, the Odbert Coal Company—the amount we should get monthly under the contract, and when I made inquiry I found that the Wheeling were compelling that company to give them the first third that was produced before they would let the coal go beyond. Now just how they forced them I do not know; but that was the situation that was explained to me. They could get coal, although we could not, and that although we had contracts which were made in advance of any contracts they made. I feel that the assigned-car rule helps us out of situations like that, and that it is a very necessary safeguard for a railroad that is not in direct communication with the (p. 539) mines.

1794 Cross-examination by Mr. BALLARD:

I only intended that my testimony relate to the Pere Marquette Railroad. There is quite a difference between the situation of the Pere Marquette in respect of mines off line and the situation of other Michigan lines. For example, the Michigan Central Railroad is an affiliated company with the New York Central, which road controls the T. & O. C. Railroad, a coal-producing road. Then there is the case of the Grand Trunk Railroad, which owns its own mines in eastern (540) Ohio. I think they would be in a very much better position to protect themselves in their fuel supply than would the Pere Marquette. The Detroit & Mackinac, I would say, is situated similarly to the Pere Marquette, in that they are a long distance from their coal. But there is an interwoven situation there. The owner of the D. & M. Railroad, Mr. McHarg, is interested in large coal properties in Virginia, from whence their coal comes. I do not know but what that would give them some protection. I think we all need assigned cars. The Detroit & Mackinac runs from Cheboygan to Bay City, about 200 miles. I should think they would consume about one-twelfth to one-fifteenth of what

we do, about 80,000 tons. That is just a rough estimate. They have no mines on their line. (P. 541) I do not see why their answer to the American Railway Association should not show that they did not use assigned cars in 1921 or 1922, because they brought their coal in by boat. We get no coal by boat. We are not in a position where we could. We have studied that for years. That is a very difficult situation for us.

By Commissioner AITCHISON:

Their coal by boat is unloaded at Alpena, I understand. I think a good deal of their coal comes—some of it, at least—from Virginia. They would bring it up to the Lakes and then take it up the Lakes by boat. It is loaded at one of the Lake Erie harbors.
1795 It comes by rail up to Lake Erie and is there (p. 542) transferred to boats and is then taken to Lake Saint Clair and up the lake. The coal which goes to Rondo we haul across Lake Erie. That is the situation. On the coal that the Pere Marquette gets across Lake Erie and which is hauled into the port of Rondo, it is transferred on a car ferry that hauls the car with the coal in it. On the other coal they get, it is dumped into a vessel and taken out by the cars. I do not say they do not need the assigned-car rule just as much as we do down in Virginia. The question is whether the Pere Marquette needs it any more than these other roads. I do not know just what (p. 543) difference it would make that they take their coal off dock at a Lake Erie port. I would have to give it some study. Concerning other differences, I think that about covers it.

By Mr. BALLARD:

They get all-rail coal; I do not know what proportion of their consumption. I know that I always ask Mr. McHarg to see that his coal all goes over our railroad; and I watch it, and when we do not get it I try to find out why. There are a lot of other railroads in Michigan with very considerable mileage. Since they have taken all our business away from us, I suppose they are very good. As to whether they have the benefit of the assigned-car rule in getting their fuel, I presume you know that Michigan is full of water power. The Commonwealth Power Company supplies electricity to many of the large developments in Michigan. (P. 544) Their power is sold to the street railways or interurbans, as you may call them. There is an interweaving of ownership, the Commonwealth Power Company being the parent company and the street railways or interurban roads or electric lines, as you may call them, being very closely associated with them. They use water power for the largest proportion of their consumption. They do use some steam coal, of course. They have to keep themselves protected. They keep
1796 coal at their power plants, to tide them over when anything happens to their electricity. I do not know off hand what proportion of the power of the interurbans of Michigan is provided

by water power and what by coal. But I would say that a very large amount, more than 50 per cent, in my judgment, would be from the water development. There is a railroad up there called the Michigan Railway Company, a large electric line. It carries some freight and interchanges with our railroad.

(P. 545) I do not know how much power they get from water and how much from coal. They are part of this inter-corporate route I spoke of. The Commonwealth-Edison Company consumes about 2,500 tons a day. That is not more than our railroad consumes. (P. 546) Their storage is all within 60 minutes of the Toledo gateway, which is a very easy operation. Our storage is all made on the west and north. Way up at a place called Baldwin is where we store at least 80 per cent of our coal. We put it up there for our protection. So there is quite a difference in that.

(547) I am not so sure that they need the assigned car as much as we do to keep running. I rather think it would protect them, without question. We have 34 fair-sized terminals on our road. That is a good many terminals for the State of Michigan. And it would be unwise to have coal piles scattered all over, with the weather that we have. It freezes in winter, and you have coal covered with snow and the snow frozen down; and it would be difficult to open up. It would cost us very much more than I testified our coal does cost. That same thing happens where we do store coal, but when you open up one big operation it is much more economical.

By Commissioner AITCHISON:

We do not store coal to protect ourselves in the summer. (P. 548) We only store to protect ourselves in the winter. We aim never to touch a coal pile until January. We put our storage in in the summer. I do not think we ought to be required to store coal in the summer.

1797 By Mr. BALLARD:

In 1920 we used about 65,000 tons of coal from our own mines. We try to buy from the mines in Michigan about 5,000 tons a month. I am doing that now. But we buy that for stationary boilers. We do that to help the situation out for them. They ask us to give them a contract spread over the year, at the rate of about 5,000 tons a month. Those contracts do not involve any assigned cars. We get what we contract for.

(P. 549) I think the shipments referred to in Exhibit 21 were made on a contract calling for the entire production of the mine. I am quite sure that we would have the output of this mine. I think I am correct—that the output of the mine was 95.77 per cent of the rating for the entire period. We took it all. This was the year 1920, which was the first year we operated our property after taking it back from the Government. We took it back on the first of March. I arranged for this coal as soon as I could thereafter, and the contract apparently ran itself out in November.

(P. 550) Our contracts read two ways. It is optional with the operator, to this extent: Take our contracts that are made on the B. & O. Railroad. An operator is obligated to give us, on this year's contract, a certain amount of coal—300,000 tons. That is the one from No. 8 field. He assigns for that coal two mines. We get the output of the two mines. He reserves unto himself the right at any time to fill our contract by giving us some coal from another mine. So that we get the output of the mine, he reserving the right to give us the coal from another mine in lieu thereof. I think he exercises that option from time to time. I know of cases where it has been done. I think we have a case now where we buy less than the output by express provision of the contract and furnish assigned cars for it. I have just learned, since we came back from lunch, that the C. & O. are now putting in the assigned-car rule
1798 in the Logan field, in (p. 551) West Virginia; and under that contract they have the right, as I recollect it, to give us the output of two mines, or, if they fail to get out the full amount of production, we get a percentage of the whole. We might not get our full amount under the assigned-car rule, as we are only entitled to 11 per cent, as I recall it, of the output of fourteen mines. It is not our practice to buy coal for shorter periods than six months or a year, with provision for the use of assigned cars. It would be unusual if we did. We make all our contracts for a year, as a rule. Our contracts were completed last year in June, and some of them only ran up to April 1st. We have 1,000 coal cars, which were purchased to protect our fuel supply. That represents about 20 per cent of our [open-top] equipment. (P. 552)

By Commissioner ATCHISON:

Open-tops now on our line are something over 200 per cent of ownership. They are being rapidly returned to their owners now. I had a report of a reduction of 750 cars in two days. We are getting rid of them very fast.

By Mr. BALLARD:

The purpose of the 3,000 open-top cars which we own in addition to his 1,000 fuel cars is to protect the business originating on the Pere Marquette Railroad. It is a business consisting of furnace sand, glass sand, molding sand, gravel for road building, both State and municipal, handling sugar beets and all classes of business that would take an open car. We do not recognize any obligation on our road to provide part of the open-top equipment to move coal coming to points on our line. (P. 553) Every fall we make request of other lines to give us open-top equipment to help us handle the movement on our line. We ask the commission to give us permission to get open-top cars for beets. We do not regard our connections as being under the obligation of helping furnish the open-top equipment necessary to move products originating on our line. We insist upon the right to use any car made empty on our lines, just as the

1799 carrier south has the right to take one of our box cars and use it in the return movement home. We think that is a permissible arrangement under the rules. We never get open-top equipment from our connections for this traffic and have it delivered empty to us for that use. (554) I think that the general rule of all railroads is that you are obligated to provide open-top equipment for all traffic originating on your line in sufficient amount to haul it to destination off your line, and that your connections are under a corresponding obligation with respect to traffic originating on their lines. We have not enough open-top equipment to fulfill that obligation. There is no real reason why the Pere Marquette should have supplied the 1,000 55-ton hopper cars for its fuel. We have just as much right to receive that fuel as has any other purchaser of fuel. We pay the freight rate, and we are entitled to coal just as much in foreign cars as is any other purchaser of coal. But we have taken it upon ourselves to supply these cars, in the hope and expectation that we would be permitted to use them under an assigned car rule. Otherwise we most certainly would not have bought them. We would have bought a different kind of car. We would have bought a flat-bottom car for use in Michigan, rather than buy the hopper cars which we did buy. We regard them as private cars intended for shuttle (555) movement in this coal business. They are not treated as private cars, however. They are not boarded. It is very necessary for us to have that kind of car. We have equipped our railroad so that we can use to the best advantage the self-clearing hopper cars; and we would not want our fuel to come to us in flat-bottom cars. So far as the car supply is concerned, we would not get our coal, I think, because there does not seem to be a sufficient car supply to go around. That is what the trouble is.

(P. 556) We paid $3.25 for our contract coal in 1920, $4.47 for our spot coal, and $4.95 for our confiscated coal. I don't think the spot coal was of the same efficiency as the contract coal. There was some gas coal which made us quite a little trouble. I imagine that they would get quite as good a price for that gas coal in the open market as we would pay for our coal. They probably would get a 1800 better one. (P. 557) Most of the spot coal we bought was very poor and dirty coal. I have no means of knowing how much other contractors, purchasing similar quantities from the same fields, but without the use of assigned cars, were required to pay at the time we contracted for coal that year. We paid more for our coal than the price averaged during the period of time that our contract ran for. There were certain months during that time that I could have bought the coal at a considerably less price. We could not foresee what would happen. (P. 558) I think we would have had to pay more if we had not been able to offer the assigned cars, assuming other conditions to be the same.

Redirect examination by Mr. Bills:

(P. 559) I think the Ann Arbor Railroad makes use of assigned cars. Their situation is similar to that of the Pere Marquette in the

matter of getting fuel. This Michigan railway, this electric road, is the one that runs from Grand Rapids to Kalamazoo. That *rial*-road is not operating by power that is derived from dams in the Kalamazoo River. I think they get some of their power from dams further up. They purchase their power from the Commonwealth Power Company.

Recross-examination by Mr. BROWN:

We keep one week's supply in cars. P. 560.) That means that we keep about 400 cars under load. The balance of it is put in storage immediately. Even now, short as we are of coal, we have stored everything over the week in cars.

1801 E. J. PEARSON, called as a witness for the carriers, having been duly sworn, testified as follows:

Direct examination by Mr. SHEAFE:

I am president of the New York, New Haven and Hartford Railroad Company. For the last six and a half years, I was vice-president for a short time, and the remainder of the time president or Federal manager of the New Haven. Prior to that, first vice-president of the Texas & Pacific for a year, and prior to that, for some four years, first vice-president of the Missouri Pacific. Prior to that for some twenty-seven (p. 561) or twenty-eight years, I was with the Northern Pacific and the Milwaukee road operating and constructing. In this matter of assigned cars there is a certain common interest between the New England roads, the New Haven, the Boston and Maine, the Maine Central, the Bangor & Aroostook, the Central Vermont, and the Rutland. Our situations in a general way are similar, and in behalf of thes roads we have had conferences in order that the information which might be presented with respect to the situation of the New England roads in this matter as a whole might cover them all. In obtaining their fuel supply those railroads are all in about the same position as the New Haven, all being roads which are in a territory which does not have the good fortune of having mines locally located. I will undertake to outline the situation and the reasons why those railroads without exception are of the belief (p. 562) that the assignment of cars is necessary, not only for their interest, but for the efficient and economical operation of the railroads and, in the end, to the general good of the territory that they serve. Without exception these railroads have no sources of fuel on their own rails. They are obliged to depend for their fuel supply on mines located in

1802 Pennsylvania and West Virginia. This involves transportation over the rails of other carriers from the coal-fields to the western gateways of New England and over rails of other carriers from the coal-fields to tide-water, thence by water to the ports of discharge in New England. Small quantities of fuel for New England are carried by rail to New York Harbor ports and thence up Long

Island Sound by water. But the bulk is carried either all-rail or rail-and-water via the ports further south. When the Railroad and the Fuel Administrations in 1918 were considering the zoning of New England as between rail and ocean coal, it developed that most of that moving all-rail is for destinations west of an imaginary line extending from the western shore of Narragansett Bay, northerly and westerly up to Worcester, thence in a general northern and westerly direction accross New England. Shipments into this territory are generally from mines located in the more northerly portions of the coal fields. (563) They move over the northerly carriers, the New York Central, the Erie, and the Pennsylvania. The territory east and north of this imaginary line would require all rail movement of unusual length. It is customarily supplied from mines in the southern portion of the coal-fields, by rail over the more southerly carriers, the Pocahontas group, the Baltimore & Ohio, and the Pennsylvania, to Hampton Roads, Baltimore and Philadelphia, and thence by sea to Providence, Boston, and the ports of discharge in Maine. In 1920 the extreme sellers' market together with the inability of the railroads to use assigned cars in making fuel contracts just prior to April 1st, forced some of the New England roads into the western and south-western Pennsylvania fields for all-rail coal, which involved very long hauls. This is one of the evil
1803 effects of the lack of assigned-car protection for railroad fuel.

Also in 1917 and 1918, due to adverse conditions of ocean transportation, particularly vessel shortage and high rates, the railroads were compelled to move an unusual amount of fuel into New England all-rail. The imaginary line across New England which applies to commercial as well as the railroad fuel, shifts somewhat, depending upon the details of supply, of transportation, and particularly as to the cost of transportation outside of New England, as the cost of coal in New England is represented (p. 564) by the combination arising from the mine price plus the cost of outside transportation. The partial use of water for transportation of fuel to New England tends to increase the necessity for assigned cars at the mine for loading to tidewater and regularity in shipment, because in addition to the other matters which are mentioned later, the movement must be regular in order that the colliers may be operated to advantage and with regularity, reducing boat demurrage to a minimum with resultant economy in operation. Moreover, tidewater shipments are subject at times to the influence of export market and temporary requirements for bunkerage. Through long experience, the disadvantage of the New England lines compared to other railroads located through or closer to mining territory indicates the necessity of accumulating and storing for protection against unexpected shortages and mining and transportation difficulties during periods of stress, principally winter conditions. This is referred to as seasonal storage. The problem of fuel for the New England railroads is one of no small importance. Normally they consume around

6,000,000 tons per year. During the year 1920 owing to the abnormal market and transportation conditions the railroads were compelled to buy large amounts of spot coal at high prices. Their total
1804 charges for fuel (565) in this year were about $45,700,000, which was approximately 28.1% of their cost of conducting transportation. In 1921 the total charges approximated $33,500,000, or about 25.1% of transportation costs. Owing to their distance from the sources of supply and the necessity for insuring regularity in shipments, it is the custom of the New England railroads to cover their requirements by contracts for the coal year, April to April, for as nearly as practicable, the total amount of fuel necessary for operation. Such contracts are based, first, on quality; second, on prospects for regularity in supply; and third, on price. First preference is given to quality because of the cost of transportation, which is usually in excess of the price of the coal at the mine. It is not economical to pay for the transportation of impurities. This customary use of high grades of fuel has resulted in the design and equipment of locomotives so as to best adapt them to the burning of such fuel. The enginemen become accustomed to it. Nothing operates to destroy the character of service so rapidly as the furnishing of inferior grades of coal. Neither would any one item increase cost and trouble in operation as rapidly as the lowering of the grade of fuel. The supply of coal on hand may be properly divided under (p. 566) two headings: First, seasonal storage; second, current supply. Resulting from their experience over a long number of years, the New England railroads have found it necessary to lay in a seasonal supply for protection against irregularity in mine loading as well as against the slowing-up during unfavorable weather of transportation. For these reasons their practice with respect to seasonal storage is represented as follows: Total
1805 tons used during the normal year, 6,000,000; capacity or facilities for seasonal storage, 1,200,000 tons; per cent of seasonal storage capacity to normal use, 20%; seasonal storage customarily laid in, 800,000; per cent of normal use, 13%. The facilities for seasonal storage are substantially adequate, but vary in character. They include yards with parallel tracks for ground storage, handled by locomotive cranes, similar yards with trestles for dumping, and locomotive cranes for casting over into storage and later for loading out into cars; long bins, with movable overhead cranes for picking up, some facilities at and in connection with the tidewater discharging plants. And in Maine, where the winter situation is more difficult, large covered bins. (P. 567) It has been lightly stated by some authorities from time to time that facilities for seasonal storage are not expensive and are easily justified. This might be true if such facilities were used frequently so that the investment in facilities and equipment would be generally in operation, but in this connection it must be taken into consideration that the customary use is but annual, once in and once out. The facilities

for handling are idle most of the year, although the cost of investment is large and runs continually. The cost of such storage averages from fifty to sixty cents per ton, including added detention of cars, added transportation of the fuel, interest, taxes, depreciation, maintenance of the storage plants, cost of handling into storage, and reloading. Then there is some depreciation and loss in the fuel, as well as the added work each year in cleaning up the remnants from the storage and preparing for the coming year's use. It is believed that New England roads are well in the lead in seasonal storage, and, taking all of the above into consideration, are doing all that could reasonably be expected in conformity with recently expressed ideas in behalf of the practice. The current or day-to-day supply is another matter. It is the general practice to construct coaling stations not only (p. 568) for elevating and delivering the day's requirements, but also with bin capacity for three or four days' supply, sufficient to minimize car detention. The machinery in such stations is in nearly constant use. The disability of infrequent use of appliances for seasonal storage does not apply, yet supported storage-bin capacity at an elevation runs into construction costs rapidly. Therefore, there is a practical limit to the storage capacity of such mechanically operated coaling stations which must be supplemented to the extent there is undue variation in the day-to-day arrivals by the holding of the added supply in cars. This is the situation which the railroads seek to remedy, the need of holding more than a normal supply in cars. Experience has demonstrated that the best—in fact, the only—remedy is through assigned cars at the mines, and by that we mean a minimum. It must not be overlooked that advantage to the railroads and economy in their operation reflect back to those who pay for the transportation which the railroads furnish and that any avoidable wastage is an economic loss falling on the public in the end. The magnitude of this wastage may be better understood when it is realized that irregular receipt of a carefully (p. 569) planned supply for regular delivery may amount to several hundred thousand dollars and easily run into the millions. Taking the New Haven and the Boston & Maine as an illustration of the customary situation in delivering fuel to locomotives, about 55 per cent is delivered by the New Haven through mechanical coaling stations at the more important terminals, having storage capacity for several days and about 52 per cent by the Boston & Maine. Perhaps 28 per cent is delivered by the New Haven by locomotive cranes at less important terminals, by the Boston & Maine about 25 per cent. The remaining, about 17 per cent on the New Haven and 23 per cent on the Boston & Maine, is delivered through the miscellaneous outlying points where locomotives lay up, where the assumption does not justify either facility, and much of the handling can be performed by engine watchmen or other employees whose other duties enable available time for the purpose. These

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points are about two-and-one-half times the number of those supplied by docks and locomotive cranes. The large number of branches, short runs, and so forth, on the New England lines requires a great number of coaling points, making it difficult to handle fuel distribution unless a regular supply is maintained. (570) That refers to the distribution on the road of the on-coming cars and their movement to the various points in order that each may be properly protected. On the Boston & Maine the coaling points average one to every 37 miles of road and on the New Haven one to every 29 miles. These different conditions of unloading compel the movement of the proper type of car to each destination. It must be readily apparent how greatly transportation is disarranged and switching increased by interference with the pre-arranged and regular movement of shipments in the proper kinds of cars. That refers to the undesirability of getting a hopper in at point where we have to shovel the coal out by hand. Experience has shown
1807 that in times of car shortage coal loading roads do not and really cannot make distribution in strict accordance with the requirements of different types of cars. From this general description of the situation at the coaling stations, methods of coaling and distribution necessary to numerous points, it is apparent that threatened irregularity in supply must be immediately anticipated by arranging for a larger accumulation. This means the holding of the surplus in cars, something to be avoided in car shortage periods. (P. 571) Assuming a cost of unloading and picking up of, say, forty cents per ton or more at points where there is neither machinery nor labor customarily available for the purpose, the cost of releasing a fifty-ton car of coal and of again picking up would be around $20 or more. The per diem charge is one dollar per day. Obviously from these comparisons the few additional days' supply required to protect against fluctuations immediately runs into car detention. Three days' extra supply on the New Haven, for example, represents from 400 to 450 additional coal cars standing. This is expensive to the railroad because of per diem and extra switching. It results in withdrawing that number of cars from the general trade, reducing shipments for others, and reducing railroad revenues as well. Shortage in supply, which is so imperative to protect against, necessitates either one of two courses. Spot coal must be purchased. This invariably means higher prices, compared to contract coal. It also results in unknown grades, generally less desirable, hence increased consumption, increased cost, and deterioration of service. Costs go up as illustrated by the record of the year 1920. The character of the service goes down. The grade of coal is the big measure as to whether our purchase is good or bad.
1808 Nothing so increases the cost of passenger service (p. 572), and of freight as well, as inferior grades of coal. Inability to secure spot coal leads to the necessity for confiscation—disasterous to the owners of the fuel and expensive to the railroads. Confisca-

tion is a last and desperate resort to be avoided by every possible means. It has been argued that the use of assigned cars can be avoided by wider distribution of purchases. It is difficult to see how this position can be sustained. If a railroad contracts for but 100 per cent of its needs, in times of car shortage, if assigned cars are not provided, its receipts of fuel will be diminished to the extent that the car supply is insufficient to meet the demand, whether the purchases are placed at one mine, or ten mines, or one hundred mines. The only remedy under such conditions is to place contracts for excess supply. No argument is necessary to prove that this practice is inconsistent with the statutory requirement for honest, efficient, and economical operation. The advantages to the railroads and in the end to the public, in fact the necessity of the situation, require assigned cars for railroad fuel. The following advantages from assigned cars insure or enable uniform quality, suitable for requirements, and favorable to good service—and again I wish to emphasize (p. 573) the necessity for a satisfactory grade of coal in order to maintain the service—a regular and continuous supply; the placing of contracts for yearly consumption at reasonable prices; continuous use of the minimum number of cars of consuming line in its fuel service; increase in cars available for commercial fuel; reduction in per diem cost to both originating and consuming lines; reduced unloading costs, due to unloading facility
1909 and type of car, each being adapted to the other; greater opportunity for solid train movements of empties and loads, and a better standard of maintenance of equipment on account of system cars being more regularly at home.

The following disadvantages, should assigned cars not be afforded, would necessitate contracting for excess fuel to safeguard against irregular supply; holding excessive supply of coal in cars, thereby withdrawing such excess equipment from commercial use; heavy increase in per diem to consuming line and excessive switching costs to both originating and consuming lines in selecting proper types of equipment for railroad fuel; excessive unloading costs to consuming line, on account of different types of equipment, greater ground storage to meet seasonal requirements, on account of decreased car supply at mines in fall and winter months, entailing higher handling costs otherwise largely unnecessary; purchase of spot coal (p. 574) at a price in excess of contract costs, to offset irregular contract shipments—and spot coal is generally of a quality unsuitable to average requirements—confiscation of commercial fuel for railroad use, with disasterous results to consignees, and confiscation by the originating or intermediate carrier of railroad fuel consigned to another line, endangering the service of the consuming road. The New Haven owns 8,814 coal cars, all steel with the exception of 16, and approximately 2,400 of them are large hoppers. The others are 80,000 pounds capacity gondolas, drop bottom. The Boston & Maine report 7,035; Maine Central, 1,148; Bangor & Aroostook, 30, but they use, I am informed, side board flats. I haven't the Central Vermont

or Rutland figures. The New Haven has 3 specially built storage yards of 100,000 tons capacity each; total, 300,000. (575) In the bin storage there is 138,615 tons capacity. We now have under
1810 construction 3 additional coal docks. Between 400 and 500 of the 8,814 cars are normally on wheels on the line of the New Haven and used for temporary storage before they are unloaded. The number decreases with the regularity of the incoming supply. I have prepared a statement showing the amount of coal we had on storage in various months of the years 1920, 1921, and up to the present date. This statement was offered and received in evidence as Exhibit No. 22. I have prepared an additional statement showing the purchase of spot coal up to the present date. This statement was offered and received in evidence as Exhibit No. 23.

Cross-examination (p. 578) by Mr. Ballard:

The 8,814 cars which our railroad owns are intended for use, general railroad use, coal, and all other commodities. If you take it as a whole they are adequate to take care of all of the open top commodities moving inbound and outbound on our railroad. There are times when cars are billed up and there are other times when we have a very large number of these cars standing as surplus. Our open top ownership is liable to be less than the cars on the road, but on box cars the situation is reversed. We do not originate very much open top freight. Nearly all of the freight we originate is box car freight and consequently our purchases of cars in the past have been the kind of car that we can load and send out. We have bought liberally (579) of coal cars with a view of having a sufficient equipment to take care of our local requirements, being able in addition to send some to foreign lines. The sending of cars from our rails down to the mines to be assigned and placed depends entirely upon the transportation situation, the commercial situation, and orders of the Interstate Commerce Commission. If there is no order from the commission, our connecting railroads would have no authority
1811 in the matter. In other words, our cars go to them under car service rules. We do not manifest any of our own empty cars to the mine to be loaded with fuel coal. (P. 580) I am not familiar with the Trayer [Traer] case, but I will say this, that when the circumstances are such from a transportation standpoint or in pursuance of the orders then existing by the commission, if we find we can take care of our own deliveries by making arrangements to send our own cars for our own shipments, we will do so. We do that under certain circumstances. During the same period it may be that we received some all-rail coal with respect to which we did not do that, because our coal is bought in a commercial market and it is a commercial shipment over foreign lines. We are entitled that our purchasers shall have the same consideration in the furnishing of cars by the road on which they are loaded as any other shipper. That is true of every nonloading railroad with respect to its fuel coal, but that does not take care of them. I do not know that (581)

there ever will be an adequate supply of cars during a temporary peak. Of course it is a fact that when there is a demand for cars in excess of the supply, an increase of cars presumeably would improve the deliveries at destination; but when you speak of car supply I cannot get it out of my mind that a railroad must be developed in its entirety in order that the cars may be used to their best efficiency. In other words, terminals, locomotives and shops, and so forth. (582) If the orders were filled 100 per cent, of course it follows that the deliveries would be 100 per cent; but as to assigned cars, my statement shows that in New England we have gone a long way in providing for storage and making provision so that when these peaks come on, instead of demanding that they be swelled still further to meet our requirements, we are in a little more favorable position, so
1812 that we do not have to crowd our contractors and we do not have to crowd the intermediate lines during that particular time, which leaves them in a little more favorable position than they should be. In talking about assigned cars I am not talking about hogging more during the times of peak. Our standpoint is that we want an arrangement that will enable us to go through the regular course, and with these arrangements we have got to keep such a general supply coming, and transportation will be protected (p. 583) with a grade of fuel that will keep our engines giving good service and so that there will be no shortage. We contract for all our coal for a year. Commencing this year we had a full year's supply contracted for.

By Mr. SHEAFE (p. 584):

We went into Federal control with 531,000 tons of coal on hand and a monthly consumption of about 200,000 tons. During the past winter and spring we had approximately 400,000. We came out of Federal control with 111,000 tons on hand.

By Mr. BALLARD:

This year we contracted for our full supply and if they are not assigned cars we might get, roughly, 50 per cent of it.

By Commissioner AITCHISON:

[I mean] During the period of shortage.

(P. 585) At the present moment there are certain service rules established by the commission, and some five weeks ago, in pursuance of those rules, the details of which I am not able to state to you, our transportation and purchasing representatives took steps to conform with them and to arrange for assigned cars as far as they could. The result was that prior to that five weeks we have been getting roughly 25 per cent of our contract coal, and since then we have been getting roughly 60 per cent. I do not recall the details as to 1920.

1813 By Commissioner AITCHISON:

As to conditions in 1920, my recollection is that there were great (p. 586) difficulties on the start. We confiscated largely and

bought a lot of spot. We finally succeeded in covering ourselves by contract, but without the benefit of assigned cars. Later there was some order made by the commission in the latter part of the summer, and it specified that a contract to be legitimate must be, as I recall, on a six months' basis. I know we then immediately reshaped some of our contracts in order to comply legally and literally and properly with the orders, so we could get the benefits of the assigned cars. We had to adjust some of our prices but we did it in order that thereafter we could go along with the assigned cars. As soon as that was accomplished there was considerable relief.

By Mr. BALLARD:

This past handling of cars is a matter that I did not post myself upon. (P. 587) We do not furnish any cars for assignment at the mines for movement to tidewater of coal that comes that way. It is handled by roads at some distance. There is just the same necessity for assigned cars there in order that the flow may be continuous. It would be undesirable, if not impracticable, for some foreign road to send cars in, because that coal inevitably goes over some dumping plant and quite likely we would not have the type of car that would facilitate the transportation and the dumping. As to whether such coal is shipped by mines that received pro rata distribution of available equipment without any assignment, that is something that is on the loading roads with which I am not familiar. (P. 588) We do not furnish cars—that is, for distant roads—through southern 1814 ports. In 1919 all-rail fuel consumption was 78 per cent; tidewater, 22 per cent; 1920 all-rail, 65 per cent; tidewater, 34 per cent; 1921, all-rail, 78 per cent; tidewater, 22 per cent. All that is on Exhibit 23. In 1922 there is a larger amount by boat because we had to buy a lot of British coal.

Q. Why did you say that the assigned car is the only remedy * * * for a lot of difficulties which you described, when these very large percentages of your coal are shipped without assigned cars?

A. The percentages shipped are usually about one-fourth of the whole. What we want the assigned car rule to do is to make a continuous flow, maintain a continuous flow in connection with the colliers.

(P. 589) It is my impression that the assigned car favors us down there under the same circumstances. But I am not familiar with those railroads. We do not send our cars down there to work between the mines and the southern port.

By Commissioner AITCHISON:

(P. 590) In making our coal contracts, there is a provision to the effect that we will furnish them cars if we can. Our ability to do that depends, of course, on the orders of the commission which are in effect. In buying under a provision of that kind, if there is a car surplusage, of course there is no question. If there is a car

shortage and priority orders are given, we would immediately avail of them to secure every assistance with respect to furnishing cars under those contracts which we would get on coal. It is kind of a loose provision in a contract because heretofore, and even now, we do not (p. 591) know just what the future is going to be with respect to this matter. Therefore we cannot guarantee cars. All we
1815 can do is to provide in effect that if we can control them we will exercise our assistance in so doing.

By Mr. BALLARD:

As to the difference between our situation and that of public utilities in New England in the matter of fuel supply, largely it comes from the same sources, but the difference relates more to storage. The public utility with a big power house and a big storage adjoining has its fuel very largely at its furnace door. Ours is consumed at a great many points. As Mr. Alfred stated, it is impracticable to go around each of these little points and put down a pile of coal. We have to concentrate it. In order to minimize the excess transportation that is involved we have three concentration points. We have to have a concentration point so that we can provide facility for dumping; facility for reloading. We have trestles for dumping. We have locomotive cranes for throwing it over in the storage, and steam shovels for throwing it out. We can work those at a few large points. We can not work them at small points. While we have provided these three main storage points at quite a large expense and equipped them to handle coal rapidly and economically and while we try to route all the (p. 592) coal we can direct from the point where it comes on our line to destination, nevertheless most of it that goes into storage has to be more or less diverted or hauled out of line, and again, after we pick it up, there is still a further out-of-line haul that would not exist if we had not availed of the storage. So we are different from them because of the necessity of spreading our operation out and increasing our transportation beyond that which would be required if we did not store. If
we were not permitted to use assigned cars, I figure we
1816 would have to store about double the amount we now store. I used 40¢ a ton to put it down and take it out as a minimum figure. It would cost us from fifty to sixty cents a ton to handle coal through our storage plants. That figure is low. If you want to go into that in still more detail I think it would be nearer 75 or 90 cents, or perhaps a dollar. (P. 593) Without assigned cars we have got to very largely increase the storage. We have gone a long way. We have spent lots of money to build coal docks and storage yards and from long experience we have provided liberally. The Maine Central faces all these problems that we have described. (P. 594) I do not know whether they use assigned cars. It is my impression that if you will follow that question of assigned cars clear to the source you will find that the assigned cars are running between the

mines and their colliers. That is an impression, but it is a very strong one. (P. 595) It is quite possible that without having assigned cars we would have to pay more. However, railroad contracts are big contracts. We have made our contracts without any guarantee of assigned cars. We have made them for a year, and I venture to say that while we have felt they were favorable from various standpoints, perhaps some one might have a broader vision of the coal market for the year ahead. We have made our contract this year with no definite assurance of assigned cars. In the past year there have been some commitments of that kind, and perhaps to a large degree it was impossible to carry them out. (P. 596) I can not say whether such a commitment is a consideration for a concession in price by the operator, because I have not been making any agreements to assign cars for a number of years. In this mat-
1817 ter of assigned cars our only ability is that which may exist from time to time through the orders of the commission. As to the necessity of assigned cars to get coal at a reasonable price, I meant if there was a shortage and you had to go out and buy spot coal you would have to pay an awfully high price for it. If we had to confiscate it the damages would be still worse. The assigned car helps to regulate current delivery. Consequently it diminishes the necessity of going into the spot market.

By Commissioner AITCHISON:

Of course, during the railroad administration we had their authority to protect ourselves. (P. 597) There was a time when we would have had to over contract in order to get a supply. I am talking now about, perhaps, four or five years ago. I do not recall that we had so much trouble in that regard during the administration. I recall a letter which I wrote to the director of car service of the commission on November 27 (1920): "In a general way we have been obliged to contract to the extent of 180 or 190 per cent in order to secure one hundred per cent. Even then at many times the hundred per cent did not come through." It was in connection with the situation that existed prior to the aid of the assigned car. (P. 598) We re-modeled our contract after the assigned car order of the commission, Service Order 18, in 1920. As to the statement in the letter "Since the re-modelling of our contracts on the estimate of contracted amounts being 115 per cent of requirements, we have only been receiving 72 per cent of our requirements," I infer it was correct, because it was taken at that time, and I am very careful with figures. There was a considerable period in there in
1818 which there was, about that time, a difference in understanding by some of the roads that handle our fuel and ourselves whether we should furnish our own cars or whether the rule applied so that they should furnish their cars. At that time our own cars were very seriously spread around all over the country and our ownership was low and we had difficulty in scraping up enough of

our own cars even to take care of our own fuel requirements. (599) During the few years prior to that the situation was bad. In 1916 and 1917 we had to over-contract largely in order to get our fuel. During the distribution by the administration many of those difficulties disappeared. The way the administration furnished fuel was to send a good deal of it from southern fields at a $3.25 a ton rate. That is as Federal manager of the road I was paying somewhere from $1.50 to $2 more for that coal because of the way they would send it to us than I would have to pay if I could get it through the shorter route. But that went into the administration bill and that is what they wanted. We have been endeavoring, with these experiences behind us, to go on a conservative contract basis that would carry itself along regularly. With this same letter was enclosed a copy of a letter to Mr. Gutheim dated November 6, stating: "In addition it has been necessary for the New Haven largely to over contract in order to secure, at least at destinations, sufficient for its requirements. The per cent of amounts contracted received during the coal years 1916–1917 was 68.1%; 1917–1918, 68.02%; 1918–1919, 59.59%; 1919–1920, 62.89%; 1920, including September, 55.49; October, 1920, 58%." (P. 660) I feel very sure those figures are
1819 correct. The reason I wrote Mr. Gutheim on November 3, "Our purchasing department had had to overcontract 130 to 135 per cent to get 100 per cent," was because, personally, I did not want to overcontract a ton more than was necessary to get our deliveries. I think it has been over several years that over-contracting has run as high as sixty per cent, but at the present time I think it would be nearer, perhaps, 15 per cent. (P. 561) The existing situation is becoming slightly more favorable to us than during the preceding years running back to 1916; more so at the present time in view of the existing service order. We have the feeling that with the large storage we have provided and usually the ten per cent or 12 per cent minimum under contracts, we ought to get all of our coal under our contracts. It ought to move in during the summer and early fall, so that during the winter and the early spring when there is stress and everybody else wants coal we will then use what we have and conserve the other roads' transportation as well as our own for the general public. I realize that we have been virtually getting a certain degree of assigned cars quite commonly in recent years by virtue of the service order of the commission in impounding open-top cars for the coal trade. What I attempted to do was to provide figures that would show the cost by weeks or months of coal. But the situation has changed so frequently, either service orders or changes in rules or market conditions or strikes, that it was hard to make any statement that would show what I wanted to in detail without being weak, because some of those factors are consequently worthless for that purpose. Without service orders impounding cars for the benefit of the coal trade and the coal
1820 users, I think we would have a greater necessity for the assigned cars than with those orders in effect.

By Mr. BROWN:

(P. 602) I do not understand that there is any special difficulty in making our contracts for coal without assigned cars. There may be by the general purchasing agent and the fuel agent. So far as I know there was no unusual difficulty in making contracts if they had an assigned car provision. Whether the price would have been less or not I cannot say. Whether we would make our contracts to get a price below spot depends on the conditions at the moment. There may be shipments of spot coal that there is no market for (p. 603), a temporary condition. Of course, the price is low, and we would not expect to make a year's contract on a temporary supply of coal. A poor market would not be a proper indication of the price for the year; neither would we think that a period of shortage and high prices would be an indication of what the contract price for the year would be. It may be one way or the other. I would say that the spot market at times might be higher than the contracts we have made.

By Mr. LIVERIGHT:

Our contracts were made sufficiently in advance to become effective on April 1, 1922. There have been one or two changes in the contracts because both parties did not get along with each other. (P. 604) It depends entirely on the conditions how far in advance of the opening of the coal year we make these contracts. They are made by the buyer under the supervision of the general purchasing agent. I think every one of them is direct with the producer or his agent. The contract goes back to the operator and even to the mines. We are not buying coal off commission men to trade around. We are buying coal to get a grade and a quality from a known source of production, a known producer. (P. 605) I think there has been a contract, one of those recent ones, that carries a clause providing for assigned cars because the order in existence at the present time enables us to put it in.

1821

By Examiner BARTEL:

The order I have reference to was made some five or six or eight weeks ago. I think service order No. 23.

Q. That has been superseded by service order No. 25 which cancels the priorities in service order No. 23?

A. Whatever it is I will say that our representatives have been hewing right strictly to the orders of the commission.

(P. 607) I do not know what proportion of our rail coal in 1920 came in assigned cars. As to assigning our cars for fuel, I can only answer by quoting the statement made perhaps yesterday or to-day by our superintendent of transportation to the effect that approximately a thousand cars that had been sent by the New Haven for coal, with a few exceptions, have all come back with coal. The identical car came back with few exceptions. We buy coal in Pennsylvania. I am not familiar enough with the fields to answer whether it is in central Pennsylvania or what particular field it is.

By Mr. SHEAFE:

General Purchasing Agent C. D. Barrows of the Maine Central submitted to me this statement: "We have no contracts
1822 covering all rail shipment from the mines. Our entire supply is tidewater shipment by steamer. Our contracts are all on a delivered alongside basis, but we are naturally vitally interested in the subject of assigned cars at the mines in order that our contractors may have a dependable flow of equipment in order to regularly effect loadings for the continuous performance of the contracts as scheduled. In our case this is particularly essential as our coal all moves tidewater, and if there is an interruption of shipment from mines to tidewater, it involves delay and expense in the detention of steamers."

By Mr. BALLARD:

There is nothing there that says they have assigned cars. But there is something in there that does state as to their hopes.

CHARLES W. GALLOWAY, called as a witness for the carriers having been duly sworn, testified as follows:

Direct examination by Mr. PRESTON:

(P. 612) I am vice president in charge of operation and maintenance, Baltimore and Ohio Railroad Company. (P. 614) The Baltimore and Ohio owns at the present time 59,083 coal cars. Of those cars, 25,398 were in service on the line on October 16, 1922. On that date 19,759 foreign cars were on the line, making a total of 45,067. There were 1,182 private cars on the line. That makes a total of 46,249 cars of all classes. The per cent of private cars in there was 2½%, ranging from 1.8 to 2.5%. The ownership of Baltimore and Ohio coal cars since January 1, 1902, has been 59,000, varying anywhere above 59 and below 60. The private cars varied on that line from January 1 to October 16, 1922, from 1.6 to 2.5. (P. 615)
1823 The number of cars the B. & O. owned on October 16, in each of the following years was: 1916, 57,041; 1917, 59,844; 1918, 60,641; 1919, 60,180; 1920, 60,231; 1921, 60,450. Using the same dates, the percentage of private cars on the line as compared with all coal cars on the line, was in 1916, 7.5% (but see Exhibit 24, second sheet); 1917, 2.4%; 1918, 1.3%; 1919, 1.7%; 1920, 2.8%; 1921, 2.8%. The percentage of private coal cars as compared with the percentage of other cars on the line at the same time has decreased. The number of mines on the Baltimore & Ohio and the short line served by it under the rules in 1916 (p. 616) was 541 with a daily rating of 3,902 fifty-ton cars. On October 10, 1922, there were 1,130 mines with fifty-ton car basis rating of 6,987 cars.

By Commissioner ATTCHISON:

That reflects some abnormal increase in ratings. The total mines and total ratings in fifty-ton cars were as follows: 1917, 677 mines, 4,393 rating; 1918, 860 mines, 3,827 rating; 1919, 912 mines, 4,551

rating; 1920, 972 mines, 5,518 rating; 1921, 1,087 mines, 6.[illegible] rating; 1922, 1,130 mines, 6,987 rating.

By Mr. PRESTON:

(P. 617.) In 1918 commercial production on the B. & O. was 33,369,357 tons; B. & O. fuel coal, 6,976,524 tons; a total of 40,345,881 tons, of which 17.29% was the railroad's fuel. In 1919 commercial, 30,147,240 tons; company fuel, 5,984,956 tons; a total of 36,132,196 tons, or 16.5% railroad fuel. In 1920 commercial, 37,765,211 tons; company fuel, 7,193,919 tons; total 44,959,130 tons, 16% of which was B. & O. railroad fuel; 1921, commercial, 26,316,162 tons; company fuel, 5,574,424 tons; total 31,890,586 tons, 17.47% B. & O. railroad fuel. For the nine months of 1922, commercial,
1824 16,088,132 tons; B. & O. fuel, 3,574,519 tons; total, 19,662,651 tons, of which 22.2 per cent was Baltimore & Ohio fuel.

Nov. 16, 1922.

By Commissioner AITCHISON:

The figures on the number of mines include just tipple mines and not waggon mines.

(P. 620) By Mr. PRESTON:

Ten statements were marked for identification as Exhibit No. 24. This exhibit was prepared by officers in the different departments of the B. & O. under my direction, and I believe that they are accurate and truly represent the matters which they purport to represent. (621) The percentage of company fuel coal for the nine months in 1922 ran up from approximately 17 per cent to 22 per cent due to the large amount we purchased on foreign lines. The effect of the coal strike in reducing commercial production would have a very marked effect upon the percentage. The commercial production was low. Our consumption was high and we did not get it from the general production on our own road. We bought a lot of it on foreign roads, mostly, I believe, in Cincinnati. (622) This statement (No. 4) shows that taking the years 1918 to 1922, both inclusive, the per cent of coal for company's use varies from 14 to 11 not loaded in cars. It was 14.5 in 1918, 14.3 in 1919, 14.08 in 1920, 14.7 in 1921, and 11.3 in 1922 not loaded in cars. That means it was delivered on the tenders of our engines and cars were not needed. (623) In other words, where our consumption was six million tons between 11 and 14% was put on tenders direct at the tipple and did not require cars. As to obtaining our fuel supply from the particular fields, in the first place, the problem confronting our company is this: We have 635 stoker-fired engines, of that number 442 must have a specifically prepared coal. The Duplex stoker prepares it own
1825 coal and for the 442 we must have a specially prepared coal. Otherwise we are required to put two firemen on these engines, one to break the coal and the other to fire the engine; and then we do (624) not get the efficiency we do from the stoker. Consequently when we were confronted with the problem of a special kind of coal

for these higher efficiency engines we worked out a plan whereby we get the same grade of coal into these territories regularly. The coal produced, in other words, in No. 8 field would go regularly to certain divisions. Therefore, they would always have the same general grade and quality of coal on these divisions continuously, and in that way we get efficiency. From the Fairmont field we have two propositions, one was three-quarter coal for our passenger engines. We get that by screening the coal. The screenings are used for the stoker-fired engines. This coal produced in the Fairmont field moves to the territory east where our high-speed service is and where we require three-quarter gas coal. The other coal moves to certain destinations indicated on this plat where it is consumed by the stoker-fired engines.

By Commissioner ATCHISON:

The three-quarter gas coal is over a screen that gives you what they call three-quarter coal. (625) It is a small lump coal. It takes all the slack out of the coal. The screenings are the result and you can blow them through the stoker. Where you have a lump coal the stoker will not take it until it is crushed. The run of mine coal as it comes from the mine cannot be handled on anything but the Duplex stoker, and we only have 142 of those. The other 443 are the Street stoker, which must have prepared coal. It is prepared by running it over screens at the mines. They put cars on different tracks. Your lump coal goes into one car and your screen 1826 coal into another and screen coal is the one you use. The 2½ inch is the small coal; the nut, pea, and slack goes in for stoker engines. We use everything, but the mine separates it for us so as to give us our stoker coal and passenger coal. It is the fine coal that we use for our stoker. To make this separation does not add anything to the cost. They make no additional charge for screening. Most of the mines I would say have screens. I do not believe I said we had trouble in getting it prepared, but that if we did not get prepared coal and have to use the run mine coal in these engines we must keep two firemen, one to break the coal and the other to fire.

(630) By Mr. PRESTON:

We have seventeen divisions and about five coaling stations to a division. As to selecting coal for the Chicago division, it is a division that is practically level, a maximum of three-tenths. Consequently, your locomotive in action there is always using steam. There is no opportunity for drifting. As a result of that you want good coal. You want a regular grade of coal and naturally you want it furnished regularly. We have made studies for several years of the proper grade of coal for the various types of locomotives and for the character of work they are required to do. As a result of these studies we have worked up the distribution and we endeavor to get our coal from fields where the best efficiency will result on the divisions where we consider that coal is better applied. (631) We

are quite an organization on fuel, its consumption, its conservation, and its use. The Chicago division coal usually comes from No. 8 field, which is on the line north from Wheeling toward Lorain and Cleveland. Engines are assigned to divisions and we aim to keep them there in their assignment. The drafting is different on different divisions and the engines must be drafted to burn
1827 different grades of coal. It is a thing that is worked out by the mechanical and fuel conservation organ zation. If we get coal in any quantities on divisions that is unusual for those locomotives assigned to that division to burn, we have to change the drafting of them because we have failures. Our efficiency is low if we make any material change in the assignment. We know very quickly. For instance in an emergency when we transfer engines we know very quickly the effect, because failures usually result where you put engines there drafted for one service and put them into another service. (632) If the tender one day is filled with one coal and another day is filled with another coal we have had failures from that condition by getting coals mixed. We do not undertake to advise the firemen or the engineer that we are changing the grade of coal. As a rule they are so familiar with the coal they get that they very quickly tell whether they have got the wrong coal in the tank—bad coal. (633) When during the strike period we were burning what our people called cats and dogs, everything we could get from anyone, we had from 18 to 21 grades of coal on a division. But as soon as we could got back to an orderly method of getting coal on assigned cars, we got back to about two grades. During the time we were burning 18 to 21 grades of coal we were having all sorts of trouble and our engines were not performing. They were steaming badly, they were shutting off part of every train or all of every train, and the fires were clinkering badly and the efficiency was very materially reduced. It is impossible to operate locomotives with all kinds or grades of coal. You must have some regularity in the character of coal you furnish and not mix it up. Our experience has been that when you mix up the grades you get clinker fires and a bad operating result. It is very important to good operation that we have a steady supply of coal of the same character and the same preparation.

1828 (634) We had an unusual number of crews who were in excess time on the division, due to poor engine performance as a result of bad coal. We were forced to put additional men on to ride the locomotives to see if they could help the fireman get along. We were partly successful by making some slight changes and back hauling some coal, but we were not very successful. In some instances we cut tonnage. I attribute some of the operating difficulties, and the main thing of getting the trains over the road, to the fact that we were trying to burn too many mixtures, too many grades of coal.

By Commissioner AITCHISON:

On October 30, 1922, the number of assigned cars of all descriptions was approximately 25% of the total cars furnished that day. (637) I would say it fairly represents existing conditions. I did not check it back generally but I would be willing to say it represents conditions during times of car shortage.

By Mr. BALLARD:

Those are cars loaded.

By Mr. PRESTON:

Those foreign fuel cars were in addition to the commercial car supply. They were sent in by the roads for their fuel. (639) and were not taken by us from the interchange. If those cars were not sent to us, the number of cars that we would have available for free distribution would be materially reduced because they would be spread over a wider field of requisition. Consequently, I have always felt particularly, due to the vacillation and the demand for coal cars, that it was a distinct advantage; it was a mutual advantage both to the railroad and the operators that we get these cars because
1829 it increased the available cars for free distribution. That is my judgment. (640) The mines served by these fuel cars are out of the percentage distribution. They do not participate in the so-called free car supply.

By Commissioner AITCHISON:

[This is true] if the mine is exclusively using foreign fuel cars. (641) These cars count in determining the rating of the mine. (643) Table No. 7 reduced to a few words is this: That is, you take out of the cars you have on your road the B. & O. fuel car equipment and your percentage of distribution is 62.2. If you throw them all in for general distribution your percentage of distribution would be 65.4 or a gain of 3.23 per cent by not adding them in assigned fuel. A ten car mine is about the average mine on the road. Applying those figures to a ten car mine, if there had been no B. & O. assigned cars on this day (October 9, 1922), the ten car mine would have gotten about three-tenths of a car. Where the car supply was 52.56 instead of 62.21 the effect would be practically about four-tenths of a car, as shown on one of the sheets of this exhibit. Other sheets show the result to be four-tenths or five-tenths of a car. (645) Before we permit foreign roalroads to send in assigned cars we require evidence of the fact that they have bona fide contracts for the output of those mines for railroad fuel. We have an understanding with the Reading as we do with all roads who send their cars to the mines on the Baltimore & Ohio for fuel that they will deliver to us daily, cars equivalent to their daily requirements.
1830 (P. 646) We have no equalization with the New Haven Railroad and the cars that the New Haven sends to us, if they were not coming for fuel would not come to us at all. We have no equalization with the Grand Trunk; and if the cars that the

Grand Trunk send to us were not coming for coal we would not give them 41 cars daily. We have a float interchange with the New Haven but it is not material in the coal business except for their fuel. Coal to New England by the New Haven has been coming all-rail through Shippensburg, Lehigh & Hudson River and Central New England. We do not get any equalization with road—there would be the Pennsylvania and the Reading and at times the Jersey Central and the Central New England, the Lehigh & Hudson River and the New Haven (p. 647), and perhaps the Boston & Maine before they got through with it. I do not know how many might be involved. We have an interchange with the Reading in gross cars of from 12 to 1400 a day. As a rule the excess is in our favor. We do not insist on having 100 cars a day on an average in excess of our interchange balance. If the Reading gets below, if it gets the reverse and is in favor of the Reading, then we go after them, but as I say it is usually the other way with us. We do not earmark those cars. Generally the particular car goes to the mine, but I would like to qualify that answer. For instance, the Reading gets coal from two directions and we may have a Keyser crew at the interchange and that crew would take Reading cars that were going to West Virginia. We may have a Cumberland crew that would take the cars that were going to this mine up in the Somerset region. They might not be the identical cars. Further, it would be exclusive switching (p. 649) and we are making a distinction in something
that would make no difference in the thing except to make
1831 us do a lot of switching. If they would send us a train of 95 empties and the first 25 were cars that were going to mines scattered in four places it would hardly seem reasonable to set out those particular 25 if there were 25 in the rear that were for some other purpose. (P. 650) Sheet 7, entitled "Statement showing percentage of car supply available at mines exclusive of assigned B. & O. R. R. fuel cars" includes the private assigned car and the foreign fuel assigned car, according to my understanding.

By Mr. PRESTON:

Sheet No. 9 is a statement of the divisions on which the fuel coal contracts existed with the number of mines on each division and the number of operators and the estimated daily tonnage. That tonnage includes what is delivered direct to locomotive tenders at tipples and such coal as comes on part mine output basis. (P. 651) We have contracts with a total of 56 mines, with 44 operators and the daily tonnage is 23,438 tons. The Monongah-Connellsville and Wheeling divisions are the three heaviest coal tonnage producing divisions that we have on the system, and we have also obtained the greatest quantity of our coal from those diversions. Statement No. 10 is prepared to show the nonpercentage and the percentage periods of coal car distribution from January 1, 1911, to September 20, 1922, inclusive. As to the percentage period from Aug. 16, 1916, to February 20, 1919, that was the war period. As to the period Aug. 1,

1919, to Jan. 8, 1921, we had two things there, (p. 652) one was the miners' strike and the other was the outlaw railroad strike that happened within that period. About the summer of 1919 our cars were considerably scattered. As to whether B. & O. fuel cars, foreign fuel cars or private fuel cars are an important factor in the handling of the car situation on the B. & O. R. R., I would say they are negligible in their effect.

1832 The ten statements marked as Exhibit No. 24 for identification were offered and received in evidence as Exhibit No. 24. (P. 655)

By Commissioner Aitchison:

The private car percentage shown in the last column of page 1 of Exhibit 24 varies very slightly over 1 per cent to slightly over 2½ per cent in the last figure shown of the grand total cars. On the first date shown on sheet 6, 30th of October, there were 139 private cars placed for loading out of a total of 3,947, or 3½ per cent of the total placed. On Oct. 16, the last date shown on sheet 1, but two weeks before this time, the maximum was 2.556 per cent of the total, while the 3½ per cent of the total placed were the private cars. (P. 657) I do not know of any other reason why there should be so many of these cars placed except the fact that they were assigned. And the fact that they were assigned has assured a very much greater percentage of those private cars being placed than their proportion, if they were thrown into the pool. (P. 658)

By Mr. Preston:

Sheet No. 1 deals with the cars on the line on that day, on the dates that are specified in this statement. Sheet No. 6 shows cars placed on the date specified in the statement. I do not see how we can compare the two percents. (P. 660) The situation as to placement of private cars will vary. The cars do not "make in" with regularity. They may not have been received promptly and may have been delayed. That will vary. The running time on our road of private cars, loads and empties going out and coming in, would depend very largely on the territory in which they were operated. There are some private cars that are never off the line. (P. 661) There are other cars that come to us through junctions, and it varies according to the distance they go. In some in-

1833 stances they go 170 miles. In other instances they go 220 miles. There would be a variable time there because of that condition. I really do not know just how long it would be, because of these variable conditions. We have had it happen that there will be on a given date a wide variation in private cars placed. I have one case in mind now, the Bethlehem Steel Corporation. Their cars become bunched because of disturbance in unloading. Then they will unload them and give us a larger number at one time. We may have received a greater number to-day, for instance, because of those varying conditions.

Cross-examination (p. 663) by Mr. BALLARD:

The Chicago division is consuming about 1,400 tons a day or about 310,000 tons a year. Part of that coal is specially prepared by running over screens, approximately 75 per cent. Grade and quality must be maintained for operating, besides the size obtained by screening. We aim to buy only good quality coal. We grade it A, B, C, etc.

Qualifying my answer as to the percentage of prepared coal, that percentage will vary according to your ability to maintain a class of engines that have one or the other kind of stokers on them. (P. 665) Unfortunately we have two classes of stokers. We were pioneers in the matter of stokers and we had about 442 that required specially prepared coal. We have engines assigned to particular divisions and this percentage would not vary for that reason very materially. It might. It depends on how your business ships. The Chicago division coal comes largely from the No. 8 field. The majority of it comes from that field. There may be some from off the Newark division.

By Commissioner DIVINE:

The No. 8 field is in the Cambridge district. (P. 666) The division shown as Akron on page 9 of my exhibit, overlaps at Holloway and there are a number of those mines in what is known as the No. 8 field.

1834 (666) I would say that taking the number 8 field has a whole there are approximately 80 mines. The figure "10" on sheet 9 of our exhibit refers to the No. 8 field. I do not know the annual production of the No. 8 field. The annual output of those ten mines that we have contracts with is given by multiplying the figure in the last column on sheet 9 by 365, less Sundays and holidays. Some coal from those ten contract mines goes to other divisions. I would say there are seventy mines down there that we have no contracts with. I haven't figured that number up exactly. (668) As to whether we could supply the Chicago division from the No. 8 field by distributing our orders among more than ten mines without giving an assigned car supply to those from whom we order coal, it would require no ingenuity to make the distribution, but it would be a very serious thing in the matter of your efficiency to burn a lot of cats-and-dogs such as you usually get when you have it spread all over the universe. There are no other mines besides these ten from which we could get reliable coal. I will qualify the answer. There may be some but not all. Not all of the eighty but more than ten. As to whether it would be impossible to spread our orders among a sufficient number of mines in that district so as to fuel the Chicago division satisfactorily on the pro rata distribution of cars I do not think it would be impossible (669) but I think it would be very detrimental to efficiency to do it. I could not fuel the Chicago division satisfactorily in the manner outlined. (670) Without the figures before me I would say that the net or so-called free car

supply after having eliminated any asignment would be around thirty five per cent. I may be wrong. I would say this is true about this time. As to whether it would be somewhat higher if all cars were available it would be negligible. If we put
1835 our own cars in it would be three or four or five per cent and with a ten car mine giving about one third of a car. There are not enough good mines, reliable mines, in the No. 8 field so that we could spread our orders among them and receive on a thirty-five or forty per cent car supply all the coal we need for the Chicago division, assuming that we get the first coal shipped from each of those mines. (671) I would like to qualify that answer. On that basis from our experience and assuming that we spread it over, we would carry a greater number of cars under load than we do to-day. We wouldn't get the coal. I don't know why. That is our experience. We tried that system when we were forced to and we carried about a thousand more cars of coal than we are required to carry under this orderly method. We burn about 1,400 tons of coal a day on the Chicago division, or on a fifty-ton basis, twenty-eight cars a day. If the Chicago division was the only part of our system I would say there are enough mines in the No. 8 district that produce good coal so that we could distribute an order for twenty-eight cars a day among them and be sure of getting our average supply. But we get six million tons of coal a year on the system. As to why we could do it on the Chicago division and not on others (672), there is a difference in the type of locomotives. There is a particular type of locomotive on that division. That is the nearest field available for coal to the Chicago division. The same thing can be done with some other division, if you are going to disregard the question of what it costs you to place cars, switch them and assemble them, as well as the question of varying grades of coal. But I would regard it as fatal to our
1836 efficiency to do it. We would be doing about twenty-eight times more switching than is necessary. I would not know where to apportion twenty-eight cars for coal among the mines. I do not believe our fuel agent would know how to apportion twenty-eight cars among the mines, assuming they were all producing the same grade of coal. (673) Twenty-eight cars are not apportioned among ten mines. You [Mr. Ballard] are selecting one division. You must take the total out of the field. We take 188 cars a day out of the so-called No. 8 field. Another difficulty in distributing the orders would be the unreliability of the supply. We could get the coal as a matter of supply if we distributed the orders among enough mines so that we could get it on a thirty or forty per cent car supply, assuming I could carry about 100,000 tons a day; but that is a penalty which I do not think we should put on the operator. To do so, judging from our experience on the B. & O., would mean a thousand more cars under load (674) than we are carrying to-day which would come out of the cars available for general distribution. Referring to page 6 of our exhibit, I haven't information with me which indi-

cates what the percentage of free supply was on these days. I will be glad to furnish it. (675) I boiled the statement down in my testimony to show that the assigned cars at present was 63.1 and if you threw in the cars now being assigned for B. & O. fuel it would change it by 3.23 per cent or increase it from 62.21 to 65.44 per cent. It would be possible to prepare a statement to recompute the exhibit to find what the increase would be if all the assigned cars were pooled instead of only B. & O. cars. (676) The percentage of free car supply appears (on sheet 7) at 62.21. (677) The 24th was Tuesday and the 9th, 16th, and 23d were Mondays (on the statement). Monday is always a larger day than any other day of the week.
1837 We will submit similar computations for four days later in the week, say four Thursdays. I regard foreign railway fuel cars as a net addition to our car supply. They are given us for the purpose of handling railway fuel from our mines to the foreign point of consumption. As to wether we get any cars from the foreign lines to help handle commercial coal in the same way, I have answered that. (678) For instance, take the Grand Trunk which gives us around 1,200 cars a month. There is no obligation on the part of the Grand Trunk to give us any cars. The same is true of the New Haven. Those 1,200 cars are for Grand Trunk fuel.

By Commissioner ATTCHISON:

The obligation may be there but as a practice it is not being done. (679) Those roads are not direct connections of the B. & O. On the basis of their being part of the through route there may be an obligation to give us the cars, but that is not done. There is no equalization. I am informed that those roads built hoppers for the purpose of obtaining their fuel, otherwise I am told they would build some other type of car. Therefore, they would not have the type of car we would want if equalization was made. I never heard or knew it to be a fact that foreign fuel cars are furnished and ear-marked for a particular traffic in recognition of obligations on connections to furnish their share of equipment necessary to haul traffic on through routes. They furnish cars because they haven't the fuel on their own railroad and in order to obtain their fuel in the case of the roads I have mentioned and some others that might be mentioned they have provided themselves with a special type of car—self-clearing car which will free itself by merely dropping the bottom. The type of car that I am informed these roads use is the so-called flat bottom type which fills the requirements of their shippers and differs to that extent from the car that the (680) heavy coal
1838 producing roads must have. Consequently, if it was not possible for them to get their coal from us or some other road they would not build that car, but they would demand from us that we produce sufficient cars—at least the shipper would—to ship coal on the orders that he has and we are prohibited from saying that a car cannot go one place or another when billing is offered for it, unless there are embargoes against that route. The effect of that in

the particular case of the Grand Trunk would be this: That such a mine on the B. & O. as did not send us approximately 1,200 cars a month to move their coal, would, if they were not able to send those cars to us, have to get additional coal, because the percentage that we have been able to furnish would not meet their demand. Or, if we threw that coal out of the assigned car rule and put it on a straight commercial basis, that mine would be one more to take from the free supply we have and drop the number available for free distribution. The cars furnished by the Grand Trunk are not furnished for the purpose of meeting to that extent, the obligation to furnish part of the equipment—straight Grand Trunk fuel cars, without regard to anything else, built for the purpose.

By Commissioner ATTERBURY:

I do not admit that there is any obligation on the Grand Trunk. I am willing to admit that there is an obligation resting on the direct connection. If you want to carry that through take the Florida East Coast, and if the Florida East Coast interchanged with the B. & O. they would never get the coal through.

By Mr. BALLARD:

They are not obligated to distribute equipment for any part of the free movement. I recognize it with direct connections and I do not recognize it with indirect connections because you might carry that to such a extreme that it would be useless. (685.)

By Commissioner ATTERBURY:

In the case of the Grand Trunk, the Pere Marquette and the New York, New Haven & Hartford the identity of the cars is respected. There may be cases where some fellow will slip his foot and improperly handle that car, not by any order or design on the part of the management, but through error on the part of some subordinate at the terminal. In the case of the Reading we do not attept to preserve the identity of the car. We tried that at one time, by billing the cars by number and having the manifest with it, and the amount of switching involved in connection with that was terrific and in spite of good sound practice, a car was a car and we took the equipment where it was grouped and we could get it readily.

By Mr. BALLARD:

We have an understanding with the Reading that they will send us so many cars a day for their fuel and we do not preserve the identity of the car. We generally get very substantial help from the Reading because of our short car supply. They are good neighbors. In addition to their fuel cars they are very free with their own cars when we are pressed. (687) Whether the fuel cars are counted in the interchange with the Reading I do not know. The Reading or any other railroad that was on equalization ought to send to us sufficient cars over and above equalization to take care

of any arbitrary allowances that they may have. By that I mean a preferred movement of fuel supply. (688) We do not assign any cars to foreign railway fuel mines for tide movement. These mines operate on the free percentage. (689) The contracts shown on sheet No. 9 of our exhibit are output contracts. We take
1840 all those mines can produce. We have no contracts for part output.

By Mr. PRESTON:

About 350 tons were part output. That is not on the assigned car basis though. That is a little bit of coal here and there, where you only want a few tons a day.

By Mr. BALLARD:

The 350 tons is contract coal in the sense of contracting for a period. Our contracts specify the mine that the coal is to come from when we are dealing with a company that owns several mines. That provision is changed only by our permission. The permission does not necessarily grow out of the necessity for protecting the grade of coal. (691) We may want more coal. For instance, an operator may have two mines. He may be giving us 26 and we may want 35. If he is willing to ship from the 35-car mine we will take 35 cars. The operator does not take a car assigned to the mine whose output we have contracted for and pool that with commercial cars and distribute them. We don't permit it. We confine our operation exclusively to the mine we designate and we will allow no pooling. Our inspectors are so informed and their inspection is on that basis. The main reason is for protecting the grade because we have inspected that mine and know that coal and we can keep track of that coal. (692) Our contracts read on output, that is, we will take the output, which, of course, contemplates that we will put enough cars in at all times and every day to take that output. My recollection of the word is that there is no reference to assigned cars, but "output" means the same thing. It means that we are going to put enough cars in their to take the output whether it be ten or fifty.

1841 By Mr. ROTHGERT:

The percentage periods on sheet 9 are the periods of car shortage. As to whether that car shortage is due solely to the fact that we have not a sufficiency of cars on our line during these periods or due to the fact that we have not sufficient motive power to distribute these cars during those periods, that can be answered in two ways. (693) As a rule it is shortage of cars, and as qualifying that we have lost, because of our heavy producing road, 12,000 cars since the 1st of August. They have gone off our road. When I complained about that, the producer says that he does not make the market; and that is true. There are other times when it would not make any difference if you had a thousand locomotives. With a ninety day trip you could not keep enough on the line. The best engines and equip-

ment have trouble on account of water, so some of our movem
as not been as good as we would like, or as good as it would be,
we were able to get good water. There have been periods on t
Baltimore & Ohio, on the St. Louis division, when they were una
to move the empties to the mines because of the lack of motive pow
Referring to the difference on page one in the percentage and t
difference that was shown on the other pages as to private and oth
cars, it isn't the fact that the difference of those two figures is d
to the fact that the private car gets a preferential distribution
compared to the other cars. If assigned cars in some cases will r
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that the thirty-three and one-third per cent gets a hundred per ce
approximately of efficiency in proportion, while the remainder of t
efficiency is distributed among the sixty-six and two-thirds pe
1842 cent. I would not view it in that way. If in any period w
haven't sufficient motive power to move all that equipment an
we give the assigned car mine a hundred per cent performance, t
the extent that the deficiency exists the other mines suffer discrim
nation, but it is not always done. If the thirty-three and one-thir
per cent is given the full hundred per cent of efficiency of motiv
power, the consumer who depends on the sixty-six and two third
per cent must suffer correspondingly. On the other hand, if th
sixty-six and two-thirds per cent fellow gets the preference, the
thirty-three and one-third per cent fellow would suffer. As to
whether if they were divided equally as to motive power there would
not be any complaint one against the other, generally speaking, tak
ing it on an average, that is what would happen. (695) We have
on the St. Louis division an assigned contract with two mines out of
twenty-nine on that division. It is necessary for us to have an
assigned car contract on that division to supply our coal. Our
company is a party to the Terminal Railroad Association of St.
Louis. We are a one-sixteenth owner. I have no jurisdiction over
it and do not know whether they own any cars or use the assigned
car. What the terminal railroad association would do if they could
not get coal would be to call on each road to bring in their coal; that
is what has happened, and that is what I would do if I were running
the terminal association. I am not acquainted with any of the
eighty contacts outside of knowing they are there. It would not be
practicable for the carrier to secure the supply that is necessary by
making contracts which would entitle it to the first output of the
mine if desired. We would not have enough money to buy clothes
to keep us from being arrested if we went on that basis. You could
make contracts on that basis if you were going to disregard
1843 costs. As to whether this was the reason we made the change to
the assigned car on the St. Louis division, this assignment of
cars is old. It is not anything new. I do not know just when the
rule was made. It has been in force for years. But this is a fact:
the assignment of cars was for the purpose of getting a proper grade

of coal regularly from a certain place. This is not the first period we have had an assigned car contract with the mines on the St. Louis division.

Q. (By Mr. ROTHQUET.) Didn't you have a contract with the mines without the assigned car?

A. If you are talking about the Breese Trenton mine, we took cars from the Breese Trenton mine largely on tenders, but when they started to trim us on price, we had to look around. Our job is to operate the road honestly as well as efficiently. We looked around for a grade of coal suitable for our needs at a price we could stand for, and we changed our method and stopped buying from those people. * * * (699)

Q. (By Mr. ROTHQUET.) In case you did have partial output contracts did you furnish to these mines cars additional to those which you placed for partial output contracts, irrespective of whether the assigned cars were up to the pro rata ratio or not?

A. Yes.

By Mr. LIVERIGHT:

As far as I know we have the same system of car distribution on all divisions. We do not count all the cars, assigned cars, private cars, and system cars as comprising the total out of which the percentage is to be derived. We take only the free cars. I do not believe we have any distribution rule whereby system cars (700) assigned cars, private cars, and foreign railway fuel cars make up a pool and a percentage is then struck. I do not recall that we have ever had. We first put aside all foreign fuel cars and make a percentage out of the balance for distribution for commercial purposes. That is the so-called free car.

1844 (P. 707) By Mr. LIVERIGHT:

We have rules governing car distribution. They are the same rules that I understand prevail on all roads, in substance, the Traer and Hocking Valley case rules. (P. 708) Our method of distribution is not to my knowledge contrary to the regulations in C. S. 31, revised, but follows them fully as far as I know. I do not know whether this method has been in force for the last five years. (P. 710) There are 292 mines on the Connellsville Division. These fuel-coal contracts are in the Somerset and Salisbury field, which we call Somerset, and what is known as the F. M. & P. District. Generally speaking, we call it the Somerset field. (P. 711) We send the fuel cars in to take the output of the 12 mines [from which we obtain coal on that division]. If it is a 10-car output we send 10 cars; if it is a 15-car output we place 15 cars. We try to place enough to take the output. The placement of more each day than is required for the output might occur at times. I do not know that it occurs frequently. For instance, if

there is a disturbance of movement and the mine cars are loaded, and they have not given us a good supply the day before, we can get more than the average on a day and we will place additional empties. They might not measure up to that and there may be cases where some are left over. (712) We keep a record of the left overs. We do not charge them to anybody. These mines are eliminated entirely and do not come into competition with the commercial coal. I do not think that results in a wastage of these empty cars. I have no idea how many cars stand over more than one day at our fuel-coal mines on the entire system. (713) Our practice with relation to private cars at this office is to place them at the mines of the operator who owns them or to whom they are consigned exclusively, in accordance with the directions of the owner. (714) If we have a mine with a 30-car rating and there are 20 cars privately owned set in there he gets no system cars at all.

1845 By Mr. BARTEL:

If 20 private cars are placed for less than the distributive share I believe the rule would be to give them cars enough to bring it up to the distributive share. I am not positive of that.

By Mr. LIVERIGHT:

I do not know that our rule is not to count the 20 cars at all against his rating, and to let him have his full share of the distribution of commercial cars besides. (715) I do not know of any special effort to deliver private cars to the people to whom they are consigned. They run in the general run of the movement of the day. I do not know of any special motive power being applied to their movement. My handling of the fuel only goes over a period of a couple of years, but I would say there has been no material change in the people who have been furnishing our fuel supply in the last ten years. That is our normal dependable supply. (716) We handle it directly with the operator and make our contract directly with him. We recognize no commission man at all.

By Commissioner ATTCHISON:

As to whether private cars have always been put only at the mines of the owner of the cars, there have been instances when due to the necessary number we have borrowed them from the owners to place in the free distribution for a trip to a specified point, and frequently those requests have been granted. (717) We do not permit the private car operator from time to time when he has no need for the cars at his regular mine, to divert them to some other mine that is in the competitive field to give that mine a full run on that day, and then subsequently take them back into regular service. (718) We have borrowed them ourselves and in one or two instances we have arbitrarily taken them to make a trip, but I am confident that I can say that we do not permit a private operator to

divert his car to some favored mine for the purpose of giving him a full run.

1846 By Mr. CURRY:

I do not know how many private car users there were on the B. & O. Some of the biggest I would say are the Bethlehem and Clarkson and the Republic Iron and Steel. (P. 719) We interchange with the Reading such private cars as run in the Bethlehem trade, I believe. There is a by-product company that occasionally puts their cars over on our line, that operates in New Jersey. They have been off and on. We maintain the identity of those cars which we interchange with the Reading. The identity of the Reading's fuel cars has not been maintained. It is of the New Haven's, and when the New York Central is getting fuel that would be maintained. The reason for not preserving the identity of the Reading cars is this excessive switching where you get such a large interchange as you have with that road. That would not apply in connection with these private cars that are interchanged, because the volume is so light. It is not unusual for us to have Reading cars up in the thousands. (720) From an operating standpoint I consider private coal cars desirable. I believe that has been the view of the officials generally of our railroad, without, of course, committing them.

Q. I am going to ask you this, with the thought that perhaps there may be some reason for change of view since the old Coal and Oil Investigation and report of January 25, 1907, by the commission to the House of Representatives. That report is not in the published volumes of the commission, but in that Mr. Hugh L. Bond, jr., vice president of the Baltimore & Ohio R. R. Co., is quoted from, and also Mr. Glasgow, who appeared as counsel for the commission. Mr. Hugh L. Bond, jr., v. p. of the B. & O. R. R. Co. (p. 2186), said this: "Now, the existence of these contracts, Somerset and Fairmont, for 3,000 cars prevented our carrying out the policy which had been outlined of getting rid of all private cars on the system." That is the end of his quotation. He further says (p. 2288), "Mr.
1847 Glasgow, I want you to explain why it is absolutely necessary that a large operator should have individual cars."

"Mr. Bond, I said, under conditions that have existed and still exist in the opinion of the operators, I would be glad to see them pass away, as a railroad man."

From that it seems that at one time one official seemed to think that they were undesirable; and it occurred to me that you could throw some light on that subject as to why the opinion differs now from what it seemed to be at that time. I might also quote from that same report from W. W. Atterbury, general manager of the Pennsylvania Railroad:

"From a transportation standpoint I think every railroad man in the country would be glad to see the private car abolished."

A. Well, one man you refer to has passed away. Both men I have a very high regard for. I hesitate to express an opinion as to what was in their minds when they made that statement. I am giving you my own opinion, which is what I understand you want, and I still stand by that opinion; from a practical standpoint, if left to me, I would encourage it." (722)

By Commissioner ATCHISON:

As to whether I would have every mine on our line have privately owned cars if it could, I did not put it just that way. I did not intend it that way. There are certain interests that require, in order to operate, a regular supply of cars, and it seems impossible, in spite of our best efforts, to maintain a supply of cars sufficient at all times, every day in the year, to give them the necessary amount of coal; and as a protection they get the private car. That is what I refer to, where the large industry needs the regular supply of coal. As to whether there is any reason why that should not be carried to the conclusion of every operator, providing his equipment, his necessary share, so that he can be supplied, from the standpoint of reason, I should say that one would have as much right as the other, and it would relieve the railroad of a capital investment. I doubt if it would ever be practicable to carry it that far.

1848

By Mr. CURRY (p. 725):

It is my understanding that where you give a mine private cars you require him to ship his output in private cars. I was corrected on that and maybe that correction was proper. Those details of distribution I will confess—there are so many things on a railroad to do that it is impossible for any one man to digest them. If we had to go into the open market and buy our coal, or if we had to pro rate it through all of the operators (p. 726), we would have about a thousand more cars of coal to insure a dependable supply. If we divided our contracts up among, say, about three or four or five times the number of operators that now hold our fuel contract, I believe it would increase the number of cars materially on the road. And the balance that did not get it would holler just as loud as they do to-day. The reason is when we have not a regular established orderly method of obtaining coal and are out buying it here and there, you pick up a bunch of 20 or 30 or 50 or 70 or 10, or whatever it may be, and you get really more coal than you would carry if you had an orderly procedure. When you scatter your requisitions over a greater number of mines, every deficiency of loading reduces your available supply that much, and for that reason it is not desirable to spread it over a lot of mines. It is not economical in switching, and, again, you come into a grade of coal, whether it is A, B, C, or D—you may have mines 25 miles apart; yes, less than that—10 miles apart. That is the red seam, which is not (p. 727) so desirable, and the Pittsburgh seam, which

is desirable; and under your plan you may force us to buy a grade of coal that we would not want to burn, to simply scatter it over a greater number of mines. I do not believe that it would be possible to buy coal from a reasonable number of mines so as to enable us to get our car supply without assigning cars.

1849 (P. 727) The Consolidated Gas, Electric, Lighting & Power Company, in Baltimore, is a large public utility which gets some coal from our district. It has no private cars. It has the McCall's Ferry which has a tremendous big plant on the Susquehanna. It has the benefit of the Bethlehem Steel private cars which run to the Penn Mary plant at Baltimore, and the by-product oven produces about four to six million cubic feet of gas which is turned into that plant for public consumption in Baltimore. To that extent they do get private cars. (P. 728) There was a company, I believe, known as the Milwaukee Coke & Gas that had operations on the Long Fork Railroad, which is a detached mine of the Baltimore & Ohio in Kentucky. They had a certain number of private cars that ran in there on the B. & O. R. R., and they had a certain number of higher capacity cars that ran in from the L. & N. side of their operations. The details of that, however, I am not familiar with beyond the capacity being greater than the bridge over the Ohio River would take through (p. 729) C. & O. interchange, and they come through over the L. & N. I have no definite knowledge whether there is any public utility securing coal on our line without the use of assigned cars. As to why public utilities can do without assigned cars and railroads should have assigned cars, there are so many instances where water power is mixed up with that, that I am unable to answer. That Baltimore situation is one that I have in mind from knowing about it in a general way; and they tell me that there is a certain time in the day when they take practically their entire load from that territory. Then if there is anything extraordinary on they throw in the steam. They are always, however, ahead because they use the water power as long as it is available and only use steam in emergency. I think the storage of coal is good business. We stored a couple of hundred thousand tons when the car supply permitted it, and I would encourage storing it when you can do so without interfering with or affecting your commercial distribution. If your car supply is strong enough, I would encourage the storage of coal.

1850 (P. 730) We stored it by unloading it on the ground and building up on it, which is in accordance with the Government's plans for storing coal to prevent fires, and we stored the last 200,000 tons very successfully under that plan. That was done last year. In one or two places it is necessary to use railroad equipment to move that coal to the points of loading of the engines. In two or three others it is not. We try to store it so we would not have to do that. We selected locations, for instance, at Cumberland, at Deshler, and at LaPaz Junction where we would not have to use

revenue equipment to handle it. At Wilmington we did. It would be possible to do away with the assigned-car rule and give each mine its pro rata share by increasing storage, if you could stand the conditions. It would involve an expenditure in excess of three million dollars to buy the proper machinery. As a practical proposition I would say it is not possible. This is because of the tremendous outlay and the deterioration, and there is so much seasonal uncertainty (731) about the requirements for coal, that you might go ahead and plan for something that adds greatly to your loss and deterioration and to your expense of handling, only to find that you should not have done it. For instance, in the coal strike we had about 47 million dollars worth of idle equipment. Nobody wanted it then. This past summer we had contracts expiring in April and overlapping April. During the months of June and July we had contracts other than for the current supply then in force, but we could not get the coal. New contracts were made as soon as there was some certainty that mines were going to open and tentative agreements were arrived at, really before the mines actually opened. (P. 732) It absolutely was not a consideration generally of those contracts that the full car supply would be furnished in consideration of the price. There was nothing in the contract using the word "guarantee," but it says that we will take the output of mines. It would not be fair to say that a railroad uses its equipment to buy coal. The fact is that I can buy coal at a tipple and have it thrown on the ground for less money than I can put a car in 1851 owned by the B. & O. and have it dumped over some tipple into that car.

Copy of contract between the Baltimore & Ohio R. R. and the M. A. Hanna & Company in 1920, identified by counsel for the railroad company, was offered and received in evidence as Exhibit No. 25. (733)

Q. Under the heading "Price" appears this statement:

"Three dollars and fifty cents ($3.50) per net ton of two thousand (2,000) lbs. f. o. b. car mine. This price is based on the cost of mining coal under conditions now prevailing in the Cambridge district and is subject to advance or decline in the amount the cost of mining may hereafter increase or decrease by reason of any change in the mining scale. The said contract price is predicated upon a car supply of 100 per cent, which the buyer guarantees to provide, except as it may be prevented by law from assigning cars for the purpose of securing this fuel. In this event the seller shall have the right to cancel the contract."

Do you know whether or not similar contracts were made with other operators?

(P. 734) A. They probably were.

As to whether contracts were made which provided a certain price if full car supply were furnished, and a certain higher price if full car supply were not furnished, that may have occurred. The details of 1920 are not clear in my mind.

Copy of contract made May 17, 1920, between the Akron Coal Company and the Baltimore & Ohio R. R. Co. was offered and received in evidence as Exhibit No. 26.

I do not recall any particular circumstance under which the contract was made. (736) As to the clause in this contract that if the buyer does not furnish cars sufficient to load an average of at least 17,500 tons per month, or if the seller through
1852 reasons over which it has no control is unable to load more than 17,500 tons per month, then the buyer shall pay for coal delivered in such month $3.20 per net ton, I do not remember any particular details as to why the clause was put in, but if I was the operator I would see a very good reason for having it in—a sliding scale. The reason there should be a higher price if you do not supply the cars is that it increases his cost of production.

A letter from M. A. Hanna & Co. to the fuel agent of the Baltimore & Ohio R. R. Co., dated Sept. 13, 1922, was offered and received in evidence as Exhibit No. 27.

(P. 738) Concerning the reference in the letter to the fact that if the B. & O. R. R. was unable to furnish cars for the full operation of the mine the price would be based on the cost of operation, plus 50 cents per ton profit, but not to exceed a price of $3.50, we were not furnished with figures as to what the cost would be. If that was effective, then we would examine to find out. (P. 740) It has not been the practice during this car shortage to place more cars at assigned car mines than they could load.

(743) By Mr. Liveright:

As to the private cars we borrowed we put them into the general distribution. We did not place them at a particular operation. As I explained, we might want to load them to the Lakes. Then we would give them to the line in that district leading to the Lakes; or we might want to make a trip with our fuel. We have done that sometimes. Or, again, it might be to tidewater in the case of the eastern movement. We would borrow some for a load to Baltimore for a trip to tide and put them into the free distribution—treat them as stock cars and give them to a mine which would assure us that they would load them and protect us in taking them. We would be indifferent as to which mine got them. It might be loaded to Baltimore or to Curtis Bay, as the case might be.

1853 Clarence G. Bowker, called as a witness, and having been first duly sworn, testified as follows:

Direct examination (p. 745) by Mr. Fishback:

I am at present operating manager of the Grand Trunk. I was previously general superintendent for nine years and have been with that company twenty-two years. In the discharge of my duties in those positions I have had occasion to become acquainted with the necessities of the Grand Trunk in securing its fuel supply and its requirement for the cars for the movement of its fuel. The coal

requirements of the Grand Trunk in tons per day are about 7,000 tons; an annual consumption of a little over two and a half millions. There are no coal mines located on the rails of the Grand Trunk Railway. (P. 746) We have 5,456 hopper-bottom steel coal cars. They were built for the purpose of getting our supply of coal, with the exception of possibly 350 or 400 which are used in the ore trade during the few summer months between Sarnia and Hamilton, Ontario. We do not furnish any equipment for commercial coal coming to the Grand Trunk from mines in the United States. The acquisition of these cars was influenced by the recognized practice of giving coal cars for railroad fuel loading to the owning carrier and assigning cars to the mine. There was no necessity for the Grand Trunk to acquire these 5,500 coal cars, except to put cars of its own in service to send to the mines for its own coal loading. It made this large investment to secure a supply of coal of a proper grade and to get away from uncertainty of supply experienced during times of car shortage (p. 747), and to insure getting coal at a reasonable price. We would not have purchased these cars if we could not assign them. The special reason which led us to make this investment was on account of purchasing mines in Ohio. In 1912 we purchased three coal mines in the State of Ohio and it was for the special purpose of getting the coal from these mines, 1854 which we can get at a much lesser cost than we can purchase coal from other mines; and we are contemplating building more of these cars—500 additional cars—and we contemplate opening other mines on our property in Ohio which would increase the output about 80 cars per day. We acquired coal cars prior to the purchase of the mines to a limited number, and they are assigned to the R. & P.——

By Mr. BALLARD:

To the R. & P. Coal Company of the Buffalo, Rochester & Pittsburgh road; the Pittsburgh, Shawmut & Northern and the Buffalo & Susquehanna.

(P. 748) By Mr. FISHBACK:

We found it necessary, in order to assure a proper supply of coal, to have cars which we would supply to the mines even before we purchased mines. That is true today. We endeavor to release the foreign car and hold our own car under load. This decidedly lessens the time of holding American cars.

(P. 749) We have very bad weather, especially in northern New York and the southern part of Ontario, frequently tying up the interchange of any cars with our connections at the frontier for as much as a week or ten days. $5,500,000 is the actual amount of money invested in this coal car equipment. The cars are hopper cars, self-clearing cars. We get a very small percentage of coal from Nova Scotia. (P. 750) The maximum amount we are able to obtain from these mines would run only 10 or 15 per cent. (P.

751) The Grand Trunk is practically dependent for its supply of fuel upon coal produced in the United States. If the Grand Trunk were prevented from assigning these cars, it would result in it being necessary for it to go into the market and buy coal either through brokers or from the operators, which would undoubtedly cause the price of coal to be advanced, not only to the railroad company, but to the public in general. We have found, at times, when it has been necessary for us to go into the market and buy coal
1855 and we have paid as much as $12 a ton; and it is not always possible to secure coal. At the present time we are in the market for coal, in order to lay in our supplies for winter. We generally put in about 90 days supply to carry us over in case there is a slowing up of transportation, caused by storm or congestion. We put in from 450,000 to 600,000 tons to carry us 90 days. To-day we have in approximately between 250,000 and 275,000 tons of coal.

1856 (752) We are endeavoring to buy coal to stock. Our purchasing agent wired Mr. Woodford, president of our mines at Lorain, Ohio, asking if he could purchase coal in the No. 8 field which he knew would be suitable for our business; and he was unable to get any coal there until after the first of December. The entire output of the mine producing coal which we thought would be suitable for us had been taken up to that time. We are buying additional coal from the mines on the Buffalo, Rochester, and Pittsburg, the Buffalo & Susquehanna, and the Pittsburgh, Shawmut, and Northern. We find that some of this coal is of very poor quality. As I was passing through the Buffalo gateway last Monday, our superintendent there advised me that we have received there 67 cars of coal, which was practically all slack. That is because we have to go into the open market. Our trouble has been in the past the poor quality of coal that we were continually getting. Since we are operating our own mines extensively and are getting practically fifty per cent or more from our own mines it has put us in a position where we could insist upon other operators giving us a better quality of coal. Up until the recent trouble of the strike, engine trouble (753) on the Grand Trunk was practically unheard of, that is in later years. Up to 1912 there were continual engine failures due to the poor quality of coal. It was a continual operation of changing the draft of the engine. It would be very injurious to the Grand Trunk Railroad if we could not assign our cars to our own mines because we get coal cheaper at our own mines in Ohio than we can get it anywhere else. As to the effect of throwing all the railroads into the open market for coal, the railroads have got to have coal and if the railroads have not got it there is no use of other
1857 industries having any. We have got to be supplied first, and it would be a question of the railroads bidding against each other. (754) After you have bought the coal, the chances are that you are going to pick up a lot of inferior coal. That would

surely influence the price the public would have to pay. The public would have to pay the same price we would.

By Commissioner ATCHISON:

In speaking of the assigned car, I mean two things; that is, that it goes to the trade and also that it is placed regardless of the distributive share that would ordinarily be coming to it. I might explain: The Buffalo gateway is somewhat congested as well as the Toledo gateway and two of our mines in the State of Ohio are located on the Pennsylvania and one on the B. & O. Since the tenth of October our car supply over the Pennsylvania Railroad has been slowed up on account of conditions there, and we are about 100,000 tons behind from those two collieries on the Pennsylvania Railroad and I do not think from what I have heard here—not being thoroughly familiar with the conditions—that we would be at all likely to get one hundred per cent of our requirements if we had to go on the percentage basis.

By Mr. FISHBACK:

If we had no assigned car and had no assurance of a steady movement of our supply of coal it would mean that we would have to hold a greater number of cars under load. We would never know what moment we would need to start that coal to some point where it was needed and we would not want to go to the expense of unloading it into piles and reloading it again.

1858 By Examiner BARTEL:

The Pennsylvania lately have been placing some of their cars during the slowing up of transportation in the last few weeks. We have not been able to hand them many of our own cars. They are not on an assigned car basis if placed by the Pennsylvania. (756) I presume they are placed on a percentage basis. That is the reason there has been a failure of the supply of cars on the Pennsylvania. As to whether when the Pennsylvania places cars on a percentage basis we at the same time place them on an assigned car basis, the Pennsylvania would have to answer that.

By Mr. FISHBACK:

The mines we purchased in 1912 were the Rail and River Coal Company mines located one on the B. & O. and two on the Pennsylvania, near Belaire, Ohio. That company has been able to supply fifty to fifty-three per cent of the requirements of the Grand Trunk for fuel. Fifty-three per cent, I think, is the highest at any time. (757) We obtained ten or fifteen per cent from the Nova Scotia. I do not believe it has ever gone to twenty. We obtained coal under necessity from other localities. We have a contract with the Ogara mine on the Illinois Central in the State of Ohio. We also have a contract with the Rochester and Pittsburgh Coal Company and we place short-term contracts with other mines on the Buffalo, Rochester and Pittsburgh and on the Buffalo and Susquehanna and some of on the Pittsburgh, Shawmut and Northern.

By Mr. BARTEL:

As to these short-term contracts, sixty-day contracts sometimes, we sometimes agree to furnish the cars on the assigned car basis, but not on the assumption that we will take the entire output. (758) As to whether we get our pro rata share I don't know what the pro rata share is at all.

1859 By Mr. FISHBACK:

We supply the cars and they are distributed by the other railroads. I do not know anything about the manner in which they are distributed. I have nothing to do with that. We have a yearly contract with the Rochester and Pittsburgh Coal Company on the Buffalo, Rochester & Pittsburgh. I could not say positively whether that is true of any mine on the Buffalo & Susquehanna, but I think most of them are short term on the Buffalo & Susquehanna and the Pittsburg, Shawmut & Northern. (759) When we ship coal from the rail and river coal mines or purchase coal from the mines on the Buffalo, Rochester & Pittsburg, the Grand Trunk sends cars from its own line in Canada to these mines to furnish the necessary equipment to move the coal from the mines in the United States to points on our lines in Canada (760), with the exception of the time I am just speaking of.

By Examiner BARTEL:

These long-term contracts are not output contracts.

By Mr. FISHBACK:

In the years 1920 and 1921 we handed to roads in the United States 42,325 Grand Trunk coal cars, and to that extent assisted in relieving the burden of the United States' carriers in supplying a similar number of cars. The average length of haul from these rail and river mines in Ohio to points to which the coal is delivered to the Grand Trunk of Canada is 338 miles to Black Rock and 329 miles, I think, to Port Huron, a round trip of about 670 or 675 miles. The average time of normal movement for a car sent by the Grand Trunk to go to the mines in Ohio and return to some of those points of delivery on the Grand Trunk, according to the figures which have been provided me, is 15 days. The movement in Canada is a very short distance compared with the movement in the United States. At the present time we have 425 of our cars
1860 on the Baltimore & Ohio handling coal between our mines and Lorain, where it is being put into boats and taken to our terminals on the Georgian Bay, where we are getting no rail haul at all. These cars are being used from the bay port on Lake Erie and (762) I understand that the Baltimore & Ohio is using them for loading ore to intermediate points on our line. I just mentioned that to show that our cars are giving some relief to the lines in the United States. As to the time required to move a car from Canada down to the mines in Ohio and back to the border (about 15 days)

it is pretty hard to say how much more time would be required in taking it to the point at which the coal is delivered and the time the car is being handled at the terminal. You can not judge what is a fair average. I would say that the total round trip would require at least 25 to 27½ days. By multiplying the 43,000 cars brought in in two years by 27½ days you can get the number of car-days which those cars represent. (763) The Grand Trunk in acquiring these 5,500 cars and in building some additional cars to be used under the general practice of assigning cars in times of shortage, and supply this very large number of cars from Canada for movement over lines in the United States to the mines and back to deliver coal to the Grand Trunk contributes materially to relieving the demand upon railroads for coal equipment and to that extent also it increases the available car supply for loading in the United States in times of car shortage for distribution to mines on the lines and in the district in which the Grand Trunk purchases its coal. In order to insure uninterrupted and regular operation of trains and service to the public a railway can not, in my opinion, depend for its coal supply upon a basis of a uniform pro rata distribution of cars to the mines which supply railway fuel (as well as those which supply commercial fuel) when you have such climatic conditions as we have. (764) I do not think railroads can depend generally on buying coal in times of car shortage, with all mines on a
1861 pro rata distribution. You could possibly get the coal if you had the money to go out and pay for it. We would not always be able to get the quality we wanted. That is a matter of importance. As to placing contracts with various mines wherever possible with the provision that the railroads should have the first preference for a certain number of cars of coal—preferential contracts, so called—that might work all right if all the railroads in the eastern United States had as many coal mines located on those roads as has the Baltimore & Ohio, but if you stop and think of the number of railroads which have to go to the Baltimore & Ohio to buy coal and they are all going to have preferential orders (765), by the time they are all filled it is questioned whether the coal on a percentage basis is going to hold out. If at a particular time we had a contract with a mine for 15 cars a day on a preferential basis, representing a large percentage of that mine's total production, and it happened at a particular time that there was only 30 per cent car supply, the result would depend upon which railroad was going to get the preference. As I understood Mr. Galloway's testimony, there are the Baltimore & Ohio, the New Haven, the Reading, the Grand Trunk, and, at times, the New York Central. So we would all be in there with preferred orders. I don't know who would get the preference.

Cross-examination by Mr. BALLARD:

As to the difference between our problem and that of the Maine Central and the Detroit and Mackinac, I am not acquainted with

the Detroit and Mackinac and am not conversant with the conditions on the Maine Central. (766) Our road runs to Portland. The Maine Central runs north and south and we run east and west. We have been getting small lots occasionally at Portland from the Nova Scotia mines. We are not getting any American coal by boat to Portland now. As to the difference between our situ-
1862 ation and that of a public utility like the Consumers' Gas Company at Toronto, that company covers every foot of space they have in stocking coal. They produce a very high grade of coal. (767) Considering the grade I do not know whether the price is unreasonable. I am not a coal expert. As to why a railroad would have to pay an unreasonable price in buying coal without assigned cars, if the public utilities do not, I know from experience that we do. I cannot suggest any reason why we should be victimized. I have often wondered why that should be when we can mine coal so much cheaper than the mine operator wants to sell it to us. I do not know any reason why we could not get coal at Portland, Maine, for our lines in New England at the same price as the Maine Central, but our consumption of coal there is very light. We would not want to get coal there and pull it over the mountains into Canada. During 1921 and 1922 there was no equalization of coal cars as between us and the American lines. They tried to equalize box cars and equipment used for common commodities. There was no equalization of coal cars because the rates all break at the frontier. We do not provide any equipment for the movement of commercial coal on our line. Such movement is very heavy.

By Commissioner Aitchison:

The American lines which participate in the movement into Canada are supposed to provide cars for the movement. I do not think it has ever been the practice of any railroad to provide a special type of car for any commodity which does not originate on its line. Furthermore, in the movement of coal into Canada, The Canadian lines get a very short haul compared with the American roads. Ninety per cent of the American coal coming into Canada is consumed within a very short distance from the border. (770) The coal will move on a bill of lading. The bill of lading will pass through the bank but it is not a through bill of
1863 lading. It is a through route. (771)

Recross-examination by Mr. Ballard:

All these coal cars were provided either for our inbound fuel or for a small movement of ore between Sarnia and somewhere else. It is not our practice to furnish cars for the inbound movement of commercial coal. We have made no provision to bring in commercial business because we have never made a practice of furnishing a special type of equipment for a commodity which does not originate on our road. As to whether, after the arrival of the cars

in this country, they are placed above the pro rata share of the mine, I do not know anything about the distribution after they get here. I do not regard that as of any importance as long as they were returned to us loaded. (773.) The only thing we are interested in is seeing that our mines get a hundred per cent. I am not interested so far as the manner in which the American cars are distributed to other mines is concerned. The coal from the mines which we own on the Pennsylvania comes to us, some at Toledo and some at Black Rock, and we deliver our self-clearing cars to the Pennsylvania (774) at those gateways. Their identity is preserved. We have no equalization of equipment with the Pennsylvania there. By the expression "open market" I meant the spot market or by buying through brokers or purchasing from operators. I did not say anything about the assigning of cars in connection with going into the market. I do not think I said that we could not get an adequate supply of satisfactory coal in the open market. I said that we can get coal in the open market if we are prepared to go in and pay the price they ask. Further, I think I said that we had not always gotten the quality of coal which we ought to have gotten and which we expected to get and furthermore there are times when we cannot get the coal. Our purchasing agent is now endeavoring to get
1864 coal in the No. 8 district and cannot get any until after December first. Possibly that is on account of the late movement of coal and after December first that source will be cut off. In the meantime, if we do not have a good supply on hand we would be cut off. We can go into the open market and get the coal without the assigned car if we are prepared to pay the price. We cannot pay $8 or $10 or $11 a ton for coal and do that continually, which has been common with us. Without the privilege of sending our cars to our mines to move the coal to our railroad we have got to buy the coal (776) and accept whatever price the mine owners are prepared to ask us. Now, we are not obligated to do that and we mine our coal much cheaper than we have been able to buy it. There is a decided difficulty in the grade. As I explained, when I was passing thru Buffalo on Monday last, concerning coal, which we had gone into the market and purchased, our superintendent advised me that we had 67 cars of coal there which was practically slack and could not go into stock. As to why contracts could not be made with just as reliable operators without assigned cars as with them, we have had troublesome experience with that sort of thing in the past so it is just as well we do not talk about that. We have been furnished by certain operators a very inferior quality of coal; and there have been occasions when we had contracts with certain operators—short term contracts running sixty or ninety days—where we had purchased coal at a low figure, but which was satisfactory to them at the time they made the contract; that later on upon a slight advance in the price of coal they immediately stopped shipping to us and started shipping to parties who would pay a higher price. I would

not say that it was or was not due to the fact that we did not use the assigned car. We are particularly anxious that we shall be permitted to send our own cars and have them assigned for use at our own mines. As I have already explained, we intend to build
1865 more of these cars and we intend to enlarge our output. The coal we get from these mines from the Rail and River mines runs from fifty to fifty-three per cent.

By Examiner BARTELL:

They are in district No. 8. We do not sell commercially from those mines. We did some years ago. We were not getting a very (778) good supply of cars then, but I do not think that has been the case in the last two or three years.

By Mr. BALLARD:

Not all of our contracts are output contracts. None of them are. We sent some cars for our other contracts. We did for the O'Gara. I think we sent twenty-five or thirty-five cars a day to the Illinois Central at Chicago, some to the Buffalo, Rochester and Pittsburg, and some to the Buffalo & Susquehanna. All of those are part output contracts. (779)

"Q. (By Mr. ROBIQUET). Mr. Bowker, you stated a while ago, as I understood it, that you had offered cars to the Pennsylvania, which they had not taken?

"A. That is correct.

"Q. And that because of the slowing down of transportation on the Pennsylvania you had not been able to secure the tonnage from your mines to give you one hundred per cent?

"A. That is correct. • • •

"Q. There was a sufficiency of cars available for the supply, according to your statement. You had cars?

"A. Yes.

"Q. It was not the lack of cars. It was simply a matter of transportation facilities or of ability to move these cars during that period?

"A. That is correct."

If they had, with their limited transportation ability, moved more cars for us, I think it applies that they would have moved less
1866 cars for some one else. It is decidedly not my thought that under thos' conditions—because we are furnishing our cars—the Pennsylvania shall give us a greater percentage or a preference in transportation facilities over the other operators in that field.

By Mr. LIVERIGHT:

The coal which we purchase from mines on the Buffalo, Rochester & Pittsburgh and the Buffalo & Susquehanna is not shipped entirely in our own equipment. It comes to us also in B R P and Buffalo & Susquehanna equipment. I do not know what proportion comes from these roads in our own equipment. (781) I do not know whether a larger proportion is delivered in the equipment of those

carriers. I would not say that we bought from these operations because they are the shortest haul. We buy run-of-mine coal from both of them, not prepared sizes, and no special preparation of any kind.

W. L. BARNES, called as a witness for the carrier, having been duly sworn, testified as follows:

Direct examination by Mr. MCFARLAND:

I am general superintendent of transportation of the Chicago, Burlington & Quincy Railroad. My railroad experience covers a period of about forty-nine years in different operating capacities. The Chicago, Burling' & Quincy Railroad owns one mine, known as the Valier mine, located in the souther' Illinois district. The output is from 4,200 to 4,500 tons per day. The daily requirements of the Burlington Railway System are variable. (783) We run as low as 10,000 tons and up to 17,000 tons; the average would be about midway. The daily output of the Valier mine will require from ninety to one hundred cars of 50-ton capacity. The mine is generally operated to its full capacity, altho the operation of that mine is interfered with considerably by our contracts for coal
1867 with other mines with which we contract quite liberally for our supply, and in slack business or under certain conditions of less requirements of coal we close down our mine, because the contracts come very nearly meeting the requirements. (784) When the contracts meet our requirements we close down the Valier mine. We worked the Valier mine in 1921, 142 days out of a working time of 300 days. We were closed down through the month of February and did a light business in July and August, 1921. We furnish the Valier mine with cars in full of its requirements. If the Valier mine received only the same percentage of cars as commercial mines in that same district, the southern Illinois district, considering the number of mines and our average percentage of cars furnished to requirements, I do not think it would mean to the other mines more than half a car each.

By Commissioner ATTERBURY:

If the same rule were applied to all the carriers in the southern district, I couldn't say how many more cars that would mean.

Q. (By Mr. MCFARLAND.) Would this apparent increase in the number of cars which commercial mines would receive be offset to any extent by the necessity for holding more coal in cars?

A. In my opinion, it would be more than offset, from the fact that we are assured of a regular supply; it is close at hand, and we do, as a matter of fact, with this protection work very close on the coal held for emergency at coaling stations.

It is the endeavor of the Burlington to keep the amount of coal on hand as a protection to the lowest point consistent with safe operation. We give that very particular attention, of course, not

to tie up any more equipment than is actually necessary to meet emergency conditions, as it gives us more cars and enables us
1868 to haul more coal and increase our revenue. It is my understanding that the Valier mine's first operation was in 1918—a small production. Before this mine was opened, I know from my own personal experience that we did have more or less difficulty in keeping up our supply. Conditions would arise, strikes and the closing down of (786) mines for various reasons, a very great demand and urgency for coal for commercial uses, and prices would soar. It seemed necessary that we have something that would stabilize the supply. We have confiscated coal prior to the opening of the Valier mine, which had a very bad effect, because it was done at a time when prices were inflated and brought forth considerable criticism of all concerned, and was a very bad practice. The operation of the Valier mine has improved conditions and made the coal supply more regular and certain. Our train rating in that district will about take the output of that mine in one day. With their production at present rate it enables us to make a full train turn around at that point. This is a cheaper and better method than picking up a few cars at one mine and a few cars at another and assembling them into a train. (787.) It is more economical to have the production more centralized. There is an advantage in operating the Valier mine when particular sizes of coal are needed. We operate our Beardstown division, and occasionally other divisions, with stoker engines, which require a fine grade of coal. On account of market conditions, sometimes we are not able to secure that size of coal, and by the control of the Valier mine all we do in such cases is to instruct the superintendent to crush all coal into stoker sizes. We have the right to make the size of coal we need in an emergency. The principal purpose in opening the Valier mine was to stabilize conditions and secure an adequate coal supply.

We use of this stoker coal, daily in that district, 2,500 to 4,000
1869 tons. It is our general practice to store coal. There is a limit as a practical matter upon the possibility of storing coal. It would not be economical to store more than a reasonable amount. There is an additional expense attached to storing coal, in the way of rehandling and otherwise. It requires ore-handling, and we estimate the cost (788) to be about 25¢ a ton to pick it up. The more you handle it, the more it breaks up, particularly southern Illinois coal, and there is some deterioration. It may catch fire, smaller sizes, if not properly stored and unless you get air in the coal.

By Commissioner AITCHISON:

I think there has been progress made in that respect by storing coal so as to get a better circulation of air. That is what I have been told.

Cross-examination by Mr. BALLARD:

We assign cars at other mines than our own. We are using from ten to seventeen thousand tons a day and the Valier mine is producing, when it works, regularly 4,200 to 4,500. We close them down if the contract catches our requirement. So our contract coal would represent a greater amount than those figures I just gave. These are not all output contracts. In southern Illinois we only have one output contract. That is a twenty-five car mine. In all the rest we are buying at agreed prices. We have no contract. We have a contract with a lignite mine at Sheridan, Wyoming. We have no other contract with any mine as I understand it except the one in southern Illinois and the Sheridan (Wyoming) lignite mine. Where we do not take the entire supply we assign the cars, but they are counted in the distribution. On the days the mines are shipping to us they may not get more than their pro rata distribution of cars when there is a short car supply. I do not think that would happen. (790)
1870 I do not think our contracts are large enough to come so near that it would permit more than a day's requirement. As to whether our fuel orders are distributed sufficiently broadly so that the amount ordered from a given mine is not as much as its car supply would permit it to ship, even with the car supply on a percentage basis, my opinion is that the contracts are so liberally distributed that it would not affect it. I find that system satisfactory in obtaining our fuel. (791) As to whether, if we had operated the Valier mine upon the percentage basis and operated it during all the available working days throughout the year we could have gotten the same amount of coal that we got in 142 days, I could not answer. It might have been necessary for us to work this mine 142 days on assigned cars especially to get our fuel.

By Mr. FLETCHER:

As to the car supply on the Burlington during this recent car-shortage period, I should say that it has been largely on the basis of our ability to handle the coal. I would consider it large as compared to what I hear reported from other roads—about 75 per cent. We have had about 75 per cent of a full car supply on the Burlington during the past few weeks, on the basis of what we could handle under proper transportation conditions and a rating that would be what the mines might produce.

1871 Nov. 17, 1922.

J. C. WARREN, called as a witness and, having been first duly sworn, testified, as follows:

Direct examination by Mr. GWATHMEY:

I am transportation assistant to the vice president and general manager in charge of operations of the Seaboard Air Line Railway and am familiar with the circumstances under which the Seaboard obtains its fuel coal supply. This company is a noncoal originating carrier. It comprises 3,563 miles of track. There are seven operating divisions, and on these operating divisions there are 23 major

coaling stations, most of which are distant from coal fields. We have 45 smaller coaling stations, making a total of 68 coaling points on the line. (P. 800) No coal mines are located on this railroad, aside from one small operation at Coal City, Ala., with a capacity of about 100 tons per day. The lines of the Seaboard bear almost directly away from the coal fields, and a large part, and particularly an important part, of the mileage of the Seaboard is practically isolated from the coal fields, the mileage in the State of Florida aggregating something like 950 miles. The entire coal supply of the Seaboard is secured from mines on foreign roads and roughly totals, as to this year's contracts, 40 per cent from West Virginia-Virginia territory and 60 per cent from Alabama mines. The average foreign line haul from the West Virginia-Virginia territory is approximately 420 miles to the junction points of the Seaboard, and from the Alabama territory it averages approximately 380 miles.

By Commissioner ATCHISON:

The carriers on whose lines our coal originates this year are the Norfolk & Western, the Interstate Railroad, the Southern
1872 Railway, the St. Louis & San Francisco, and the Birmingham belt, a switching line in the Birmingham, Ala., territory. We also have a contract on the Chesapeake & Ohio. The amount of coal consumed for the three years ending (p. 801) December 31, 1921, was 1,235,000 tons, or about 103,000 tons per month. The heaviest period of consumption is December to April, inclusive. The policy of the Seaboard is to make contracts in the early spring for its coal supply the ensuing year, beginning July 1st. A spread of some 20 to 25 per cent is usually allowed between the maximum and minimum tonnage contracted for, to take care of fluctuations in consumption, interference to shipping, and so forth. We over-contract only to the extent that I have just named, 20 to 25 per cent over the average consumption. The minimum for this year is 1,210,000 tons, against an average consumption of 1,235,000 tons. I should say it is approximately the same.

(P. 802) We have, on occasion, placed short-term contracts; that is, speaking of past years. At the present time we have not contracted for but the 20 to 25 per cent spread that I have just given. It is our policy to endeavor to protect substantially our whole fuel requirements by contract. We would not have to over-contract in order to get our entire requirements under our contracts, with the protection of the assigned car rule. I would say that, without the assigned-car rule, we would have to consider doing so. Just to what extent, I would not like to hazard a statement at this time. The minimum as to this year's contracts is approximately what our average consumption has been for the past three years. These contracts were made in May of this year, and (p. 803) the minimum is somewhat over the average consumption that we forecasted for the ensuing year at the time the contracts were placed. Therefore, it is a fact that the minimum and the maximum tonnage under this

year's contracts is in excess of what we had estimated the consumption to be for the fuel year beginning July 1st. We allow a certain element of over-contracting. At the time these particular
1873 contracts were made there was no particular intimation that there would be any serious car shortage. Therefore, that particular feature was not given special consideration. The coal cars owned by the Seaboard were 3,870 as of November 1, 1922, and 3,907 as of January 1, 1921. Of this ownership approximately one-third—or 1,300 cars—is required to take care of traffic originating on its own rails requiring open-top equipment; such traffic consisting (p. 804) largely of ballast, crushed stone, sand, and similar construction material. The remaining 2,600 cars are available for assignment to fuel-coal service and are sufficient to take care of the greater part of the coal requirements. To a large extent the acquirement of this type of equipment in past years was for its fuel-coal supply under protection of the assigned-car rule. A proper fuel supply is of vital necessity to the Seaboard. For regular, prompt, and economical operation, its coal supply must be furnished regularly, in adequate quantities, and through routes best adapted to its operations. In considering quality, we know by experience that there is an excess consumption not less than 12 per cent when mixed and unsatisfactory grades of coal are used, as compared with a regular supply from contract mines, where coal is shipped in accordance with our specifications and subject to our inspection. (805) Aside from that loss in efficiency, there are in the case of the Seaboard some what I might term indirect or more or less intangible losses and difficulties due to unsatisfactory coal. I mean steam failures, and particularly as such failures refer to perishable freight traffic, of which we move a considerable volume, and fast passenger service on a single-track railroad. Speaking from the experience of transportation men, there is nothing that can upset your railroad quicker and more thoroughly than to have a steam failure on a superior train. That reacts on practically every train on the road at the time, and creates an important and at times a material excess expense, besides interrupting the service.

1874–1875 By Mr. GWATHMEY:

The perishable traffic of the Seaboard is a very large and important item of its traffic. As to the excess consumption in periods when we do not have a satisfactory and regular supply of coal, I have some figures showing the coal consumption of a four months' period, March to June, 1920, at which time we utilized or used a considerable amount of confiscated commercial coal and a considerable amount of coal secured by spot purchases, as compared with March to June, 1922, in which period we (806) were provided with a regular supply of contract coal, prepared in accordance with our specifications and up to our inspection.

Commissioner ATTCHISON. I am wondering if a good deal of this testimony is not as to a matter concerning which there is no dispute;

that is, that it is desirable and necessary that a carrier should have secured to it, by some means, a regular and proper supply of fuel.

Mr. BALLARD. We admit that, sir.

Commissioner ATTCHISON. Is that admitted by the coal operators generally?

Mr. ROTHEQUET. Yes, sir.

Commissioner ATTCHISON. Let that concession stand, then, in the record as established by the consent of all concerned who are present at the hearing. Is there any dispute regarding this: That it is highly undesirable from every standpoint that a carrier should be compelled to resort to confiscation or should resort to confiscation?

(P. 807) Mr. BALLARD. That is our position, Mr. Commissioner.

Commissioner ATTCHISON. Is there dispute with respect to that?

(There was no response.)

That fact, then, may be taken as established.

1876 By Mr. GWATHMEY:

In 1920, a period in which we were using undesirable coal to a considerable extent, the number of pounds of coal consumed per passenger-car mile in the four months' period was 21.1. In the same period of 1922 it was 18.1, a difference of 14.2 per cent. (P. 808) In freight service the pounds of coal consumed per thousand gross-ton miles in 1920 were 214.9; in 1922, 187.7—a difference of 12.7 per cent. The 12.7 represents our percentage of decrease, 1922 under 1920, and, in our view, the penalty expressed in efficiency. The result if you express the same figures in tons is 49,590 tons.

(809) The volume and class of business handled in the two periods was not materially advanced, and, according to my opinion, the loss in efficiency stated is largely attributable to the mixed coal used in 1920. The Seaboard is very peculiarly, I should say, unfortunately situated with reference to securing an emergency supply of coal through confiscation, for the reason that the volume of commercial coal handled is very small and in most months below the amount of coal required for fuel purposes. I have some figures, selected at random, showing the actual tons of commercial coal moved in certain months; and I should say that they are typical. They are as follows: In December, 1921, 58,375 tons; in January, 1922, 75,991 tons; in April, 1922, 64,181 tons; in May, 1922, 44,674 tons.

Almost every grade of coal is represented in this tonnage—anthracite, soft coal of different grades, including gas coal, and other high grades for special purposes. In my opinion to attempt to operate locomotives from such a varying supply of coal is impracticable, besides being expensive. Prior to Federal control it was our policy to assign our coal cars to the fuel-coal trade to the extent, I should say, of 75 per cent. At times it was 100 per cent; but there was no arbitrary line drawn. There were cases where we have made arrangements with the originating road to use its cars through a mutually satisfactory understanding. During Federal control to a large extent the rules changed back and forth, and the operation

1877 of coal car pools and other developments prevented our maintaining that policy. At some periods, as I recall it, we could not have done so legally. I am not prepared to give specific periods on that. And speaking of the coal-strike period beginning November 1919, as I recall it, a car supply, as far as were concerned, played practically no part in the securing of a coal supply. We were forced to obtain the major part of (p. 811) our fuel supply through the Fuel Administration, and we got unsatisfactory grades of coal—along with everybody else, of course—and at points where we found it very difficult to receive it and move it either economically or without detriment to other traffic. As to our situation in 1922, up to July 1st, when the shopmen's strike broke, we had practically no problem as to car supply. There was generally in the fields from which we draw a fairly good supply, and our consumption was below minimum contracts at that time. We had practically no difficulty in securing a proper and satisfactory supply of coal. Since July 1st we have had extreme difficulty in securing coal, the difficulty as to a great part of the coal, in my opinion, being due to the status of the car supply of the roads from which we bought our coal.

By Commissioner ATTICHSON:

Some of the difficulty is due to the condition of motive power, but I think that in the case of the roads we have our principal contracts with had we had the same degree of protection we formerly had we would have been able to secure a reasonable supply of (p. 812) coal. I am not prepared to testify as to motive power conditions on the originating roads; but I think that to a large extent that is true. As to the Chesapeake & Ohio, we have no operative contract at this time on the Chesapeake & Ohio. I do not want to ignore the effect of the shopmen's strike and ignore the fact that the whole country was dependent on the nonunion mines served by these particu-
1878 lar carriers. But (p. 813) I think that, had we had the assigned-car rule, we would have fared much better. I think that, generally speaking, we would have been able to have taken care of ourselves in fairly good shape on the matter of coal supply.

By Mr. GWATHMEY:

We feel the need of a uniform and clearly understood rule on car distribution for fuel coal. The practices, as I understand them, of roads with which we do business are varying. Some of them permit the assignment of cars. Some of them do not. I am unable to state just what their reasons are. I can only tell you the effect it has on our coal supply. We feel that the subject should be clarified and made uniform on all coal-producing roads, so that a road in the position of the Seaboard Air Line would know where it stood on coal supply. The company has been compelled since July 1st (p. 814) to draw upon the storage supply of coal to the extent of 60,000 tons. The subject of using fuel oil is being considered. The Florida East Coast Railway now uses fuel oil, according to my understanding.

Cross examination by Mr. BALLARD:

We have storage capacity for about 100,000 tons, about one month's supply. Either the coal is dumped on the ground and the track pulled over it as (p. 815) the pile progresses, or in some cases a trestle is built and the coal dumped through on the ground below. We have coal storage at five points—that is, five of the 23 large coaling stations I mentioned. We do not as a rule provide any open-top equipment for inbound traffic, except for fuel coal. We have a small amount of inbound commercial coal. We do not have a great deal of other inbound open-top traffic. I would not consider it significant. As to what is the average time per round trip of our fuel cars in fuel service I could not answer. We have not 2,600 in that service. They are in commercial service, because
1879 we have not the protection of the assigned-car rule, and (p. 816) a good part of them are on other roads. We have not had the protection of the assigned car rule on any stable basis for a long time.

By Commissioner ATTCHISON:

We originate a good deal of lumber. We use flats principally for that. The figure I gave was confined to coal cars, two types, the hopper car and the drop-bottom gondola, which, as far as we are concerned, in fuel service are practically the same. In addition we have a very few gondolas without the drop-bottom. (817.)

By Mr. BALLARD:

As to whether I said we had 2,600 cars available for assignment to fuel coal, that was simply describing the ownership. It does not apply to current conditions. We are now using some of those for our own outbound traffic, and to that extent we are increasing our 1,300 cars which I said were intended for our outbound traffic. We burn a million and a quarter tons a year. (P. 818.)

Our 2,600 cars, if kept in this service, would not in my opinion be adequate to move that one and a quarter million tons of coal a year, but they would move a sufficient volume to assure us of what we consider a safe and adequate supply. (P. 819.) We have, in the past, had some output contracts. We have none at the present time. Our suggestion is that we be permitted to assign cars for a part of the commercial output on other lines. I do not think there is any provision at present in our contracts concerning price as affected by car supply. I know there is no practical provision. We are not in position to insure car supply.

By Mr. BROWN:

We have 23 major coaling stations and 45 smaller operations and five places where we store coal.
1880 (820) The five points where we store coal are, in the opinion of the operating officers of the company, the proper points to store it and the proper distributing points. It is not necessary to

spread them out over the entire 23 major coaling stations. We haven't facilities at these major coaling stations to store coal. The points I have given you are the principal points at which we are prepared to store coal and provided with storage facilities.

In my opinion it is economical operation of a railway that has to store coal and has no mines on its line to select only five points where its coal is stored. That is sufficient, with proper protection from coal-car ownership that the Seaboard (p. 821) has provided itself with. There are practically no back hauls now on account of the location of these storage points. We have had sufficient coal so far; but we have steadily since July 1st received less coal than we have consumed. Possibly we ought to do so in time of car shortage. We aim to do that in winter, which is the reason for providing the storage that I spoke of. It is money in our pocket to do that as far as we reasonably can, because it gives us a greater degree of transportation to handle commercial business, and we are usually taxed in the winter months in that respect. We prefer to store just as much coal as we reasonably can, aside from the standpoint of providing cars. We usually store our coal in the spring and summer. That, as a general rule, is during the time of car plenty. It is stored to meet what we reasonably know will be the exigencies of the next winter's business. There is objection upon our part to using stored coal at the present time, because it leaves us without storage for next winter. We have not enough storage, if you look at it from the extreme point of view. I think one month's supply in storage is enough.

(P. 823) By Mr. FLETCHER:

I would not say that weather conditions played a predominating part in the Seaboard's situation.

1881 By Mr. CURRY:

(P. 824) We have a small contract with a mine, the Linden mine, on the Southern in the Appalachia, Va., district.

(P. 825) We are not a coal-loading road, and I am not familiar with the practices or regulations on the coal-loading roads. We simply feel that we have the right to send cars to a contract shipper to get our coal, and we do not have knowledge of his other requirements. As far as the Seaboard Air Line is concerned, we have not considered that particular feature of giving the mine an extra share of cars, and I am not prepared to testify on that particular feature. Our contracts are not for the full output of the mines.

By Mr. LIVERIGHT:

(826) In 1922 very little, I should say, of our coal has been furnished in assigned cars. Far the greater part of our fuel supply since Federal control has come in unassigned cars. We endeavor to keep coal on wheels at the lowest possible safe minimum consistent with proper operation. We try to minimize the detention of cars loaded with fuel coal. I have no figures immediately before me as to how

long we keep it stored that way. We use at the present time about 75 cars of coal a day, and we have about 420 cars on wheels, as I recall it. Those figures are both approximate. That includes coal in transit to coaling stations as well as coal standing at the coaling stations, and I should say that as to coal standing at stations, it does not exceed two and a half days' supply.

By Mr. FLETCHER (p. 827):

Our only concern is that some rule be put into effect which will permit us to send our cars to the mines and get regularly the amount of coal for which we have contracted.

By Commissioner AITCHISON:

I think when we turn those cars over to one of the coal-
1882 loading carriers we want to have it transport those cars and place them regardless of what it does with respect to cars that it owns and as to other mines.

By Mr. FLETCHER:

I think it is correct to say that in addition to that we want a rule so framed that we will get the amount of coal we contract for, even in periods of car shortage.

By Commissioner AITCHISON:

I tried to make it clear that we would not get all of it—that we would allow for some margin.

(P. 828) J. W. DAVIS, called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. BRONSON:

I am president of the car allotment commission of the Chesapeake & Ohio Railway Company. I have held positions as chief car distributor on the Chesapeake & Ohio; then local car distributor of all of their five districts; have had several years' experience in and around mines, but have never actually dug coal.

The car allotment commission is employed by the railway company to (p. 831) ascertain, as near as possible, the actual capacity of the mines on its lines to be used for car distribution purposes. It rates the mines and distributes the cars, and it has full and complete control over those functions. The car allotment commission is divided into two sections—the mine rating section and the car-distribution section. I, as chairman, have supervision over both.

(P. 832.) We have five coal districts on our line, at which we have five local car distributors and five assistant local car distributors. All in all, we have approximately 25 officers and em-
1883 ployes in our car allotment commission. (833) These men are not engaged in any duties other than mine rating and car distribution, except myself. I act more or less in a way as assistant to the general superintendent of the western division of the Chesapeake & Ohio. The car allotment commission directs the movement of coal cars to division points where the fuel coal is required for

locomotive purposes. That is part of my duty, so that I am familiar not only with mine rating and car distribution, but also the movement of the cars to the distributing point. Prior to Sept. 10, 1922, our mines were rated strictly in accordance with C. S. 31 (revised) and cars were distributed in accordance with C. S. 31 (revised) and Supplement No. 1. (834) By reason of the fact that the power situation, due to strike conditions in August and September, was such that we were able to furnish our mines with but a two-day car supply per week, which does not in any way reflect the true capacity of any of the mines on our line, it became necessary to modify the ratings to more equitably represent the real capacity. This was done by taking the July ratings based on June affidavits as a basis and making such adjustments as changed conditions necessitated. The same basis is now in effect and cars are being distributed in accordance with C. S. 31 (revised) and Supplements No. 1 and No. 2. (835) Supplement No. 2 became effective November 10, 1922, and reestablished as rule 8 the Hocking Valley Trare rule precisely as shown in Exhibit A, rule 8. This was not done after the expiration of Service Order No. 23 on account of the power situation on our line due to the shopmen's strike. Our power situation recently necessitated discontinuing even the practice of assigning private cars, and the motive-power situation did not sufficiently improve to enable us to handle foreign railway-fuel cars in accordance with the
1884 Hocking-Valley Trare rule until November 10th. (836) We resumed the practice of handling assigned cars—private cars (as assigned cars)—at the expiration of Service Order 23. (837) I would suggest a change in the first line of rule 8, page 5, of Exhibit I, by adding the words: "Shipping commercial coal" after the word "mines." As I read the Hocking Valley-Trare cases, the assigned-car rules therein prescribed by the Interstate Commerce Commission were designed to apply to mines shipping commercial coal and were not intended to apply to fuel mines where coal was not shipped commercially (838) for a reasonable period, which I construe to be a car shortage period. From a Chesapeake & Ohio transportation standpoint I prefer to limit the assigned-car rule as applied to both private cars and foreign railway fuel cars to those cases where the mines use the cars for reasonable periods of time. The present practice is not to treat private cars or foreign railway-fuel cars as assigned cars under rule 8, as it now stands, unless the cars are furnished the mines under contracts calling for six-month period and full outputs. (839.) Private cars are treated as assigned cars only when by prior agreement they are to be used for reasonable periods. Approximately 2,800 private cars operate over C. & O. tracks. They operate in the shuttle service and increase the railway company's car supply to a certain extent. We encourage our connections to make their contracts for the entire output and for a full period.

By Commissioner AITCHISON:

We do this by explaining to them the transportation conditions under which we are handicapped by handling these cars for, say, a day or two. It is practically an impossibility to do it on our lines. We try to show them if they will make it for a longer period we can give them much better service getting the cars to the mine.

1885 By Mr. BRONSON:

(840) As a matter of fact, if they do not furnish cars in accordance with our requirements we do not treat them as assigned cars. We require them to deliver cars to us in particular cuts, not less than twenty-five cars to a cut, and to go to a certain mine or mines. We have recently been called upon to assign private cars for spot-coal purchases and refused to do so. We inspected the cars, placed them at the operations requested by the consumer, and charged the cars on our general distribution as system cars. The C. & O. owns 945 locomotives and 42,000 coal cars. We have also under construction, or under contract for construction, thirty-one additional locomotives and 3,000 coal cars. The C. & O. uses annually approximately 2,500,000 tons of fuel coal, of which approximately 2,200,000 tons are taken on cars and approximately 300,000 tons are taken on engine tenders. Of this amount approximately 700,000 tons normally are taken from the company's own mines. The other 1,500,000 tons are taken from five Island Creek Coal Company mines and two Mallory Coal Company mines on long-term contracts for entire outputs. These are presumed to be normal figures. They might vary some. (842) The C. & O. mines are located as follows: The Dorothy mine at Dorothy, West Virginia, the Sarita mine at Sarita, W. Va., the Eunice mine at Eunice, W. Va., or on our Coal River extension of the Cabin Creek branch in our Kanawha district. The Island Creek fuel mines are located in Logan district on Mud Fork branch. The Mallory mines are located as follows: Mallory No. 1 on Huff Creek branch of the Logan Division; Mallory No. 2 on the Man-Gilbert branch, Logan division. High volatile steam coal is produced at those mines. We use high volatile steam coal exclusively for engine fuel, with the exception of about four cars of smokeless coal per day for engine fuel purposes in the District of Columbia and a small portion of smokeless coal on our ferryboats at Norfolk
1886 and Newport News. The high volatile steam coal for our purpose is regarded as more advantageous and economical. (843) Advance weekly advice is given by the general superintendent covering their fuel requirements for the following week and the coal is sent to each general division accordingly. The distribution to consuming points is then made by the general superintendents. The effect of this arrangement is that the cars are promptly loaded at locomotive terminals. We have coal elevators of modern type, generally speaking, but not in all cases. We do not store any coal other than small storage capacity we have in our bins and coal elevators, which is very small. The largest does not exceed 300 tons at Russell. We do not store coal in piles, because we have never

considered it efficient and economical operation to store coal in piles on our roads, producing as we do all our fuel coal and using as we do but a small percentage of our coal cars. Under our arrangement for securing fuel coal we figure to carry approximately 1,400 cars in constant use, but under the practice we are now working, dumping the coal promptly upon arrival at terminals, it reduces the number of cars held daily to approximately 1,200 cars. As soon as the coal is received we immediately fill our elevators and release the equipment. We keep our bins full all the time. The 1,200 cars are approximately three per cent of the total C. & O. coal cars. We produce approximately 24,000,000 tons of coal per annum, of which we use approximately 2,400,000 or 2,500,000 tons per year. Only about 2,200,000 is transported in cars. The percentage we use is about nine per cent. As to why we can use for fuel purposes approximately three per cent of our coal car equipment to transport nine per cent of the coal produced we move our fuel coal to dumping points and dump it promptly on arrival and release the equipment and get a
1887 better haul out of the car. We control the movement of the coal from the time it is loaded until it is run to the mine, and it does not move in the same channel that a car would for off line points. And the haul is less. (846) We watch very carefully to see that our fuel mines are only given sufficient cars to take care of their output that day. These methods enable us to get along with about three per cent of our equipment for fuel-coal purposes. We have approximately $4,000,000 invested in the three mines operated by the C. & O. If the C. & O. were not permitted to use at will its own cars to carry its own coal produced by it, I do not think it would be possible for it to continue mining its own coal economically. During a car-shortage period the cost would be increased to such an extent that it would be uneconomical for us to operate them. If there was no car-shortage period we could. If there were extended car-shortage periods we could not. (847) Under the laws of West Virginia coal produced by the C. & O. can not be shipped for commercial purposes. I do not know anything about the charter of the Pocohontas Fuel Company owned by the C. & O., which owns these mines. The mines, while owned by the Pocohontas Fuel Company, are run by the C. & O. itself. The contracts with the Mud Fork and Mallory mines run for a period of three years and are exclusive outputs. As I recall the contracts, they provide about the following: That the mines agree to produce a certain large output, sufficient with the coal produced at the company's own mines to take care of its fuel-coal requirements. We agreed to have cars at tipples to take the coal produced. (848) The contracts provided that if we fail to do so we would pay a higher price for the coal we received. So far as I know we have not paid higher price, but we have at certain times granted an extension of the contracts to take care of coal that we were unable to take. Those contracts were executed in the fall of 1920, the price

being $3.75 to the Island Creek Coal Company for shipments
1888 from the Mud Fork mines and $3.50 to the Mallory Company.
The prices were high in the fall of 1920 when the contracts were made. Subsequently for a considerable period the prices were low and we could have bought coal very much cheaper, but the prices at the present time have now gone a little in excess of our contract price. Practically all last year we could have bought coal for $2 a ton cheaper than contract price. The free use of our cars does not always mean lower prices for fuel coal. Neither Mud Fork nor Mallory mines have called upon us for transportation of any coal since the mines were opened. They have always shipped coal to the C. & O.; delivered it at the tipples. No transportation service was requested. There has never been any coal shipped from our mines, Dorothy, Sarita, and Eunice. The reason we confine our coal contracts to Mud Fork and Mallory Mines rather than divide our requirements among all our mines of the high volatile districts is: First, certain mines only produce efficient coal for engine purposes. (850) Second, many mines produce coal of too low a grade to be used at all for engine purposes. Third, an unduly large number of cars would be required to handle fuel-coal contract for in this manner. Fourth, the cost of assembling the coal would be excessive. Fifth, it would interfere with our transportation functions. Sixth, the responsibility of filling the requirements would be divided between too many people. Seventh, it would be practically impossible to make a close inspection of the coal. We use our cars at will for the purpose of taking fuel coal from our own mines and from our contract mines up to our needs, but, as none of these lines ship commercial coal, the cars so used are not assigned cars as I understand the rule. (851) Our past experience has proven that it would not be feasible to make contracts for our annual fuel requirements when we particularly needed coal without using our cars freely.
1889 In 1920 our company attempted to but its 1920 fuel coal without using its cars freely. After asking for bids from all its coal operators in the high volatile fields we received replies from twenty-five of the operators, twenty-four advising they would not furnish fuel at any price; the other that he would furnish 100 tons at a fair price provided we furnished fuel-car supply, two cars a day. The bids were mailed to approximately 250 operators.

"Mr. Bronson: That was in March, 1920. It was for the fuel year beginning April 1, 1920."

1890 By Mr. Bronson:

(P. 851) As the result of our failing to buy coal at that time we confiscated approximately 2 million dollars' worth of coal, some of it costing the company as high as $16.50 a ton (852) during the period of car shortage that existed about nine months. We confiscated up to the time these Mud Fork and Mallory contracts went into effect. We also bought during that period considerable spot coal. If we were able to contract with mines without

assigned cars (853) it would be necessary for us to over-contract sufficiently to make sure of getting our 100 per cent requirements on the basis of a short-car supply. As to meeting our requirements by overcontracting it could only be possible by accurately forecasting the volume of traffic and the percentage of car shortage during the year, dividing up the contracts among a considerable number of mines. It is not possible, however, to foretell. My attention has been called to the so-called evils of confiscation. We have received very serious complaints from our own industries on our line and industries off our line. In fact, we have been threatened with lawsuits in a number of cases. When we confiscate any quantity of coal the registration of a large number of objections immediately comes to the attention of the company. (P. 854) We use every effort to avoid confiscation on our line and only confiscate as a last resort. We found that the use of assigned private foreign railway cars and our own cars freely for our own fuel under C. S. 31, revised, decreases the ratings of such mines, for the reason that the labor efficiency is greater when the mines are working fewer days per week than it is when they are working a full week. That applies to conditions on our line. We have found that from our actual calculations, made for a period of six months in 1920. They show that had we divided all of the cars to all of the mines on our line for this six months' period in 1920 (p. 855) the excess would have been approximately 3.45 per cent. The so-called non-assigned mines would have gotten about 3.45 per cent more cars.

That takes into consideration all our fuel cars, all cars.

1891 Q. In other words, it takes into consideration all the cars used at Dorothy, Sarita, and Eunice mines which do not ship coal commercially, all the cars used at Mud Fork and Mallory mines—so; it would not take those in, because the calculation was made before that?

A. No.

Q. All private cars and foreign-line fuel cars?

A. Yes.

We publish our mine ratings and car distribution results monthly, on the 10th of the following month, in a printed pamphlet, distributed to every operating company on our line. (856) That has been in effect since, I think, the first part of 1920 or 1919. Our operators find it very valuable and there has never been any objection. Where we confiscate coal the chances are we might confiscate coal of practically the same grade, but in ordinary confiscations we grab whatever is available. Sometimes we get prepared coal which has a higher price, or we might get a low grade of coal. (857) There was a time when we assigned cars. I think it was from April 15, 1920. We did assign them under C. S. 31, revised, for a period of six months. During the period of Federal control, when we could not use assigned cars, we bought spot coal. The Federal fuel distribution did not help the Chesapeake & Ohio out.

Q. [By Mr. Bronson.] * * * There has been an apparent car shortage on the C. & O. since about July 10th of this year, as I recall it. Is that an actual car shortage?

A. It is not what I would call a car shortage as much as it is a motive-power shortage, due to the shopmen's strike.

(P. 858) The car shortage first appeared on July 10; that is, we were short of cars, although we had sufficient cars on the line but not sufficient power to move the cars.

1892 By Commissioner AITCHISON:

Car shortage, as commonly called, is simply the fact that a car for some season is not at a place where it is desired at the time it is desired, and the car shortage appeared on July 10, although we had a surplus.

Q. (By Mr. BRONSON.) If your engine power had been in satisfactory condition on July 10 and for a considerable period thereafter, would there have been any car shortage on the C. & O.?

A. Our records indicate that we really did not run short of cars on the line until the first part of August.

Q. Since then your so-called car shortage has been partly due to power trouble and partly to shortage of cars?

A. Yes, sir.

Q. And due to the fact that the connections would not take the cars or could not?

A. At the present time it is due more or less to the failure of the connections to take our loads promptly, and the situation has turned from a car shortage and a power shortage to the inability of the connections to take currently.

Q. And that might again turn?

A. It might turn any day. (859)

(P. 861) As to obtaining our coal, not by over-contracting but providing in the contract that the first shipments each day should come to us, I do not believe an operator on our line would make a contract of that kind. As to how many mines on our road produce suitable coal for our fuel, I would say approximately not in excess of 200 scattered over four districts, with an excessive haul from—well, you may say, each district.

(P. 865) By Mr. BRONSON:

We arranged to distribute our cars as between the five districts to make it as near equal as possible, based on their order
1893 each day, and we try if there are shortages to even up in the coming month. Each district is supposed to get its fair share. It is a mining proposition rather than a district proposition under our distribution.

By Mr. BROWN:

We treat the private car different from what we do the foreign railroad fuel car and also different from our system fuel car. (P. 866) We believe that our system fuel should be handled as

I have given in my previous testimony; that if there is no transportation asked by those mines we take the coal right at the tipple and render no transportation service whatever to those mines; the assigned cars are private property of the assigned car owner, and are placed to the mines in accordance with present rule 8. Our treatment of private cars in times of car shortage is not to make them system cars except on spot business. Spot business is business where an outside concern owning private equipment cares to come to one of our mines and desires to buy, say, 25 cars of coal and wants about 25 cars over here. Those cars are counted as system cars. The 2,500 private cars that we have on our line are governed by the agreements under which they are operating.

By Mr. BRONSON:

The ones that go to mines for regular shipments covered by our advance agreements for the entire output are treated as assigned cars.

By Mr. BROWN:

Those cars shuttle from and to the industry. (P. 867) I would hardly call that special transportation service. They take the same movement as the rest of the coal on our line. While that is intact, we handle it with a great deal less work, and we do not give it a special movement. As to requiring private cars to be placed
1894 in blocks, that is the empties returning, not the loads going to the consumer. We do that to enable us to give better transportation service to our system cars to prevent unnecessary switching. It uses no more motive power than the system car; not as much.

By Mr. BRONSON:

You can handle 25 cars more easily than you can handle 5. That is the reason for requiring 25 cars to be delivered to us in one cut, to avoid switching and operating system cars. (868) Service Order 23 had conditions which prevented our handling private cars. That is not in our contract, but it is an order of the Interior Commerce Commission which would set aside any agreement we have with the private car lines.

By Mr. CURRY:

Private cars were not treated as commercial cars until about November 10, but were treated as assigned cars at the expiration of Service Order 23. Foreign fuel railway cars were not treated in accordance with the Hocking Valley and Traer rule until November 10. About that time we had a large number of loads (p. 869) waiting for movement on the C. & O. I do not think the operation of the assigned car rule had anything to do with that. I think it was entirely due to the failure of our connections to take currently, as well as our own failure on certain days to get them to connections. From an operating standpoint private cars are not undesirable in our case when handled for a period of six months and delivered to us

as I have stated. I would not say that the supplying of full car supply in our contracts was in part consideration for the price, as much as to enable us to get a steady supply from as few a number of mines as possible, and suitable coal for our locomotives. In fact, the price of our fuel contract was $2.00 in excess of the current price last year. We lost several million dollars on it. The original contract provided that if the railroad failed to furnish a full car
1895 supply the price would be more. This has been modified (870) from time to time and instead of paying higher prices we have made an extension to the contractor to take the difference between what we actually take now and the maximum that they thought they could produce. There are public utilities which secure their coal on the C. & O. The Kentucky Solvay people secure it; the McKenney Steel Corporation; the Seaboard By-Product Co. of Chicago. I think that is about all. These public utilities have their own private equipment.

By Mr. BROWN (p. 871):

As to the district from which our foreign railway fuel car supply comes from, it would be supplied from any one of the five districts. At the present time I do not know of but one that is really sending cars in at this time, but we have had requests from at least 15 different railroads asking as to the assigned cars. It is not a fact that the coal ordinarily of foreign lines comes from the same district as our own coal.

By Commissioner ATTCHISON (p. 872):

Private cars are sent in on our line and are set at designated mines. The identity of those cars is preserved from the time we receive them until they are set and returned, with the exception of misuses that you occasionally find due to inexperienced help in handling the cars in the movement through the yards; but it is very occasionally that a car is misused that way. At the present time the owners of these private cars take the entire output of the mines at which they are placed, and have been doing so since 1920. (P. 873) At the present time every day that they send in the private cars they have them placed at the designated mines alone. In the past the C. & O. has set private cars at other mines when the owner of the cars does not desire coal from a particular mine, but not during the present time. It was discontinued in the latter part of last year; but during the latter part of last year we had a
1896 full car supply to other mines and it had no bearing whatever on the car supply of any other operation. It has not been permitted on our line since the latter part of 1921.

By Mr. BRONSON:

We have had requests but we have turned them down. We have handled the cars as system cars.

(874) By Commissioner AITCHISON:

We have one case, I believe, where cars were charged as system cars and this one mine ran ahead, from which the over-supply at the present time has been taken off. As we interpreted Service Order 23 we applied its provision to the five mines which supply our coal.

(876) By Mr. CURRY:

Until October 1st it was customary in finding the percentage for the field to count in all mines, including these mines which furnished fuel to the railroad. We discontinued it as of that time and previous to that time it was merely done for record purposes.

(877) A. R. BEISEL, called as a witness, and being first duly sworn, testified as follows:

Direct examination by Mr. BRONSON:

I am general manager of the Island Creek Coal Company, located in Logan County, W. Va., and of the Pond Creek Coal Company, located in Pike County, Ky.

The Island Creek Coal Co. operates 19 mines. Mines 15 to 19, inclusive, are engaged exclusively in furnishing the C. & O. with railway fuel. These mines do not use private cars. The C. & O. furnishes the cars for the fuel, and takes all the fuel. We have 150 cars which belong to the Island Creek Coal Company that are used in double service between the mines and Huntington to transport coal from the mines to Huntington for river transportation.

1897 (P. 878) Other than that we use system cars. We have a contract with the Pere Marquette Railroad, but up to the present time we have not been furnished any assigned cars. We have mines which are supplied with system cars, mines which sometimes are supplied with private cars and mines which are exclusively engaged in furnishing railway fuel coal. I have never found on that mines where we have used assigned cars or fuel cars have affected our labor supply. It has never bothered our other labor supply. It is true that in the majority of cases the miner does not want to work full time. That has been demonstrated very clearly. If he gets from three to four days' work he thinks he has done his part. (879) We have had any number of cases where men have left the mines that have been working 6 days a week and have gone to the mines working three and four days a week. You might term it [as due to] their failure to want to work six days a week. They earn enough under the present scale to work three or four days a week without having to work six days a week. They have told us repeatedly that they can make enough in two or three days to take care of their requirements. In those cases they do not care to continue working. As to whether a mine that works six days a week gets a better class of labor, possibly in this one respect, that you get a class of men that will work more time; but as to the actual loading ability of the individual miner, no. A man working at a mine that operates three or four days a week produces more coal than a man

who works in a mine operating six days a week. The fewer number of days he works the faster he works and the more coal he produces. (880) As quickly as a car shortage takes place the individual ability of a loader increases, you might say, in proportion as the car supply decreases. The only benefit we have received from assigned cars was during the period of several months in 1920. This year we have not received any benefit whatever on our privately owned cars because it has been a question of locomotive disability. In fact, I do not believe that our privately owned cars have received the same movement that the system cars have received. At least, that 1898 has been my contention. The private cars running between our mines and the tipple at Huntington received almost a solid train movement, both loaded and empty. (881) I am personally of the opinion that the assigned car privilege does not bother the labor supply. That is based upon our records.

Cross-examination by Mr. BALLARD:

We have shipped coal on our Pere Marquette contract. It was testified in this hearing that we shipped 36 per cent on a 25 per cent car supply. We are doing that currently. That is moving in commercial cars. We have not had any assigned cars under that contract at all. (882) We have not for a good many years had foreign fuel contracts on which assigned cars were provided. We have not received any foreign railway fuel assigned cars since Federal control. Our C. & O. fuel assigned cars are confined to mines 15 to 19, and are never included with cars we receive for the other mines, or distributed pro rata. In billing those cars we do not make out billing tags for them. They never receive the same treatment that a system car receives through our billing office. They are not treated as being in commercial transportation. I would make a rough statement that the percentage of running time our commercial mines are working on now is about 35 or 40 per cent. (883) Our C. & O. fuel mines are running 95 per cent. Our Pere Marquette contract calls for a certain percentage of our output from mines 1 to 14, or it can be restricted to one or two individual mines. The five Mud Fork mines are not included. Assigned cars have never been furnished. I do not know whether the contract calls for assigned cars or not. I have never seen the wording of the contract.

By Mr. BROWN (884):

We filled 35 per cent of the Pere Marquette contracts on a 25 per cent car supply. In other words, they were only getting 35 per cent of their coal requirements, but if they had given us 1899 assigned cars we would certainly have given them 100 per cent. That would not make these 14 mines out of which we supply the Pere Marquette more actively operating. It would be confined to one mine instead of fourteen. Without that provision in the contract, it can be limited to one or two mines. If we would get assigned cars we certainly would limit it to one mine, because

there would be no object in spreading a small number of assign cars around fourteen mines. If we did that, of course that wou take that mine off the distribution of system cars.

By Commissioner AITCHISON (p. 885):

I think that the assigned car privilege is really for the bene of the industry as a whole. I have entertained that view for sever years, and before I had contracts for railroad fuel. Before we h such contracts I was a neighbor of an operator who had a railro fuel contract, and his operation never interfered in any way wi my operation.

By Mr. ROTHEQUET (p. 886):

The only service that we have received from the private cars th was a benefit was during the year 1920 for about three or fo months. As to the cost of production, in cents per ton on the un basis, as between the mines served by the railroad with a full suppl and our 35 per cent [there is] possibly about 12 or 15 cents in favo of the fuel mines.

Mr. BROWSON:

That is true at the present time. Of course, there are time when the car supply is a little more uniform than it is at present when there is practically no difference in cost. (887)

By Mr. LIVERIGHT:

The 12 cents a ton difference I attribute in part to the increased efficiency of the men working on short time. You know the eff
1900 ciency of the coal operator has to increase on short running time in order to stay in the business. If it did not he would be out of luck. Short running time will increase any mine rating. In a lot of cases the increase is artificial.

By Mr. ROTHEQUET:

(P. 889) I am operating a non-union mine. I have never operated a union mine.

By Mr. BROWSON:

Our company is the largest mine-operating company on the C. & O.

1901 EDWIN G. GOODWIN, called as a witness and, having been first duly sworn, testified as follows:

Direct examination by Mr. RIXEY (889):

I have acted in the capacity of fuel agent for the Southern Railway Company since the year 1914, and at present am fuel agent for the Southern Railway system. Prior to assuming the duties of fuel agent, I was chief fuel inspector for the Southern Railway Company for about five years. As chief fuel inspector it was my duty to investigate the quality of coal bought for (891) use on the railroad and to make recommendations as to what coal should be purchased

for locomotive use, based on its quality and the efficiency to be obtained therefrom. As fuel agent, my duties are more concerned with the purchase of coal, and, while I do not actually sign the contracts, I work up the information in connection therewith, and, after having conferred with the chief fuel inspector regarding the quality and efficiency of the coal offered, recommend with whom contracts should be made. Consequently, for nearly thirteen years I have been in a position to closely observe the effect of trying to procure our coal under the assigned car basis and otherwise.

The Southern Railway system is divided into lines east and lines west. Lines east consist of approximately 4,200 miles of track, located east and north of the Southern Railway system's line running from Cincinnati, through Harriman, Ooltewah Junction (near Chattanooga), Atlanta, Jesup, and Brunswick, and serving the District of Columbia and the States of Virginia, North Carolina, South Carolina, Georgia, Kentucky, and Tennessee. (P. 892) Lines west consist of approximately 4,100 miles of track, located west and south of and including the above-mentioned line and serving the States of Missouri, Illinois, Indiana, Kentucky, Ohio, Tennessee, Georgia, Alabama, Florida, Mississippi, and Louisiana. For the year ending June 30, 1923, the estimated maximum fuel coal requirements 1982 for the lines east is 2,800,000 tons, and for the lines west, 3,071,522 tons. On the lines east, with a greater mileage, we have less average consumption than on the lines west, with a lesser mileage, on account of the double track having reduced our fuel consumption in comparison on the lines east. We have been able to contract for our full requirements during the year ending June 30, 1923, but since the issuance of Service Order No. 23, August 15, 1922, we have had great difficulty in securing the coal for which we contracted. Under normal conditions of consumption we endeavor to carry about 20 days' supply of coal on the average. This varies considerably, depending on the distance the various points of consumption may be from their source of supply. The more remote divisions try to carry 30 days' supply, while those nearer to the mines can get along with a 10 days' supply under normal consumption.

By Examiner Bartel (893):

We are having trouble at present in getting coal under contract. The lines east have about a three days' supply and the lines west about an eight days' supply of coal. Our fields of fuel coal supply are normally in Virginia, Tennessee, Kentucky, and Alabama, and for our St. Louis-Louisville division from mines in Indiana and Illinois. Our Washington division is supplied principally from the Virginia fields, but we occasionally purchase fuel coal for the Washington division from mines located in West Virginia on the Chesapeake & Ohio Railway or Baltimore & Ohio Railroad. I file, as an exhibit, a blueprint graphically showing the normal sources of coal supply and the usual distribution of fuel coal on the lines of the Southern Railway system. The typewritten memorandum attached

to the map shows the approximate annual purchases for the year to end June 30, 1923, in the various fields, based on the monthly contract tonnages. The several fields from which fuel coal is taken are indicated by colonial circles on the blueprint filed. (894)
1903 The different colored lines on the map radiating from these circles and following the lines of railway indicate the several divisions or sections of line normally supplied by the different fields, and when these colors are traced back to the large circle in the same color the source of supply is indicated. The colored dotted lines indicate the coal fields served by the Southern Railway system, and, in connection with the legend on the map, the character of coal produced in the several fields. This map indicates the coal supplied for the various divisions and how the coal is purchased from certain fields to take advantage of the shorter hauls to supply the several divisions of the system. Our purchases of the fuel coal depend, of course, on the amount of coal it is estimated will be used for the year. The larger the amount to be purchased, the more mines we purchase from, but there are usually certain mines in a given district which are advantageously located, have large outputs of proper grade and quality and which can produce their coal cheaper than other mines not so advantageously located. These mines sell us coal year in and year out, because they produce the kind and quality of coal that we require, and they are usually in a position to make us a lower price than other mines not so advantageously situated. (P. 895) Our fuel contracts provide for a minimum and a maximum tonnage. The maximum figures usually represent all that the mine can do. In other words, the contracts provide for the entire output, so that the mine from which the fuel coal is taken is eliminated from the commercial market. Where exceptions are made, and they are few in number, in using assigned cars to obtain our fuel supply from any mine of which only a part of the output is taken, we follow strictly the provisions of our car distribution rules, which are the same as those embodied in CS-31, revised. That is to say, in the exceptional cases where only a part of the output is taken for fuel purposes, cars are assigned for our daily contract requirements and charged against the mine. If the number of cars furnished on
1904 a given day under this procedure does not equal the distributive share in the field, additional commercial cars are furnished that mine until its share does equal its distributive share in the field. If the assigned cars equal or exceed the mine's pro rata for that day, then no additional cars are furnished the mine.

By Examiner Bartel:

If they exceed the pro rata share on a given day, we undertake to equalize our mines as quickly as possible. We do not intend to give more than its pro rata share in case it is a contract mine. (896) On a certain day, if their pro rata share is exceeded, we do not undertake to equalize the excess, if there is no commercial coal shipped on that day from that mine. Under normal conditions we

supply our needs entirely from mines located on the lines of the Southern Railway system and we endeavor to make entire output contracts. When the coal operator contracts with the railroad, he usually prefers to contract for the entire output of his mine. In this manner he does away with any added selling and collection expense in connection with any of his output, and can, therefore, afford to sell his entire output cheaper than would be possible if he had to put a force of selling agents in the field to dispose of any considerable portion of his product. Moreover, we avoid, so far as possible, the purchase of No. 2 or undersize steam coal, except for stoker engine purposes, because the question of whether we get the undersize coal depends almost entirely upon the operator's ability to dispose of his oversize. Consequently, contracts of this last mentioned kind are not so dependable as contracts for straight run-of-mine coal and tonnage approximating the entire output. Prior to the war period, I cannot recall any large amount (p. 897) of coal confiscated by the Southern Railway. We were then working under the assigned car basis which had been in effect since July 1, 1908, and prior thereto. During all those years I do not recall any serious complaints against the Southern Railway Company in regard
1905 to the assignment of cars for its railroad fuel coal bought under contract; nor did we experience any great difficulty in making contracts and getting coal of proper quality for which we contracted.

By Commissioner AITCHISON:

That was since 1908 and up to the war period. Mr. Gutheim has explained how railroad fuel requirements were handled during the period of Federal control. At the end of Federal control, and on March 2, 1920, the Southern Railway system found itself with less than three days' supply of fuel coal for the lines composing that system; in some places probably not more than 10 hours' supply was available. There was such a shortage during March, 1920, that we were compelled to resort to confiscation to keep the railroad running. As a result of this confiscation, a bill of injunction was filed against the Southern Railway in the State court at Rome, Ga., by the Graves-Harper Company, enjoining the railroad from this practice. The priority orders and the price control feature in (898) vogue during the Railroad Administration were gone, and our company had been enjoined from confiscating coal. We thereupon restored the assigned car basis for securing the coal we purchased under contract early in April, 1920, and thereafter we continued upon and used the assigned car basis for securing our contract fuel requirements until August, 1922, and until after Service Order No. 23 was issued by the commission. On April 15, 1920, the commission issued its notice of that date, addressed to carriers and shippers, recommending that the uniform rules as contained in the Railroad Administration's car service Circular CS-31 (revised) be continued in effect, except that rule 8 was amended *as* as to permit the use of assigned cars. We

promptly issued, on behalf of our companies, CS-31 (revised) with rule 8 amended in accordance with the recommendation contained in the notice of April 15, 1920. Our supply of coal began to build up; but we had no sooner gone on the assigned car basis than
1906 the Corona Coal Company, of Birmingham, Ala., filed a bill for an injunction, and this litigation interfered for a time without securing coal under contract by the use of assigned cars in Alabama. As a result of this interruption of the use of assigned cars, we were not able to secure our fuel requirements (899) bought under contract; and later paid as high as $14 and $15 per ton for confiscated coal, which would not have been necessary had we been allowed to go on with the use of assigned cars uninterruptedly. After the injunction granted in the Corona case was dissolved, we continued the use of assigned cars until after Service Order No. 23 was issued, on August 15, 1922, and while on the assigned car basis we had no difficulty in securing our fuel requirements. Our experience has been that during the periods in which the assigned car basis has not been in operation or was not employed we could not obtain our fuel requirements, although we had contracts therefor, with the result that we had to purchase on the spot market and confiscate large amounts of coal.

By Commissioner ATTCHISON:

We have been purchasing spot coal since August, 1922, and we have confiscated some coal. In the latter part of August and down to September 20, 1922 (900), I think we attempted to purchase spot coal, and I believe we did succeed in purchasing some. I know we confiscated but comparatively little. We had priority fixed by the commission as high as anybody during that time. We were obliged to go into the spot market for coal. We just did not get enough coal under the priority. We bought straight run-of-mine coal, class 2 of priority, I think, the same as our own. That simply means that we took advantage of our priority rights in getting coal—taking the highest class obtainable. We took no coal under priority except from our contract mines. We bought some spot coal. (901) I do not recall that we bought any spot coal from August 15th to September 20th. We have bought some spot coal since then from a number of operators in Tennessee.

1907 Mr. RIXEY. I do not think we had priority orders over 24 hours.

By Commissioner ATTCHISON:

We had priority orders from the 15th of August until the 20th of September as high as anybody. That is, in class 2. We were in class 2 every minute of that time, but we had no priority orders in class 1. I do not think we bought any spot coal before September 20th. During the year 1920, we worked on the assigned-car basis for only approximately eight months, and for a part of this period the use of assigned cars was interrupted or interfered with by litigation.

During the year 1920 the average contract price was $3.12 per ton, but we could not obtain the contract coal, due to our inability to use assigned cars, with the result that we had to purchase (902) 360,854 tons of coal on the spot market at an average price of $5. 323,150 tons of coal was confiscated at an average price of $9.

By Examiner BARTEL:

We restored some time in October, 1922, the assigned-car ruling we had. As to getting our confiscated coal without going to the assigned-car rule, we have gone to the assigned-car rule in its entirety. We have tried to help the operator out as much as possible. We are not assigning cars for the entire week. We are trying to live from hand to mouth, in an effort to help the commercial operator out.

By Commissioner AITCHISON:

As to whether the operation of the assigned-car rule is to the detriment of the commercial operator, I do not know. He might not get so many cars. I am not sure about that. But we certainly do not get as much coal without the assigned-car rule. (903) If we put the assigned-car rule in effect in its entirety, I do not think the commercial operator would get nearly as many cars. Where
1908 it is necessary to resort to confiscation, our experience has been that the coal thus obtained is frequently either of poor quality or is not suitable for use in the locomotives as they are drafted. Moreover, it often happens that even when the coal confiscated is of the best quality, it does not mix properly with the coal furnished under contract and results in clinkering and consequent steam failures. Coal is not confiscated by the Southern Railway unless and until it is absolutely needed. Consequently, in practically all cases, it has to be consumed before an inspection can be made. The inspectors are, as a rule, kept busy inspecting coal at the contract mines. It is, therefore, important that the railroad get and use the coal for which it has contracted in its regular fuel contracts.

By Mr. RUFFY:

(904) When we store coal, we usually store about 250,000 or 300,000 tons to meet the nonworking time during the Christmas holidays and weather conditions; and we are constantly menaced with fires, theft, etc., and the quality of the coal when it is used is not as good as before being stored. We have had large fires at Huntingburg, Ind.; Meridian, Miss.; Suggsville, Ala.; Alexandria, Va.; and Rockmart, Ga. I would not consider it feasible or practicable to resort to the practice of storing coal for the purpose of eliminating the use of assigned cars, either 100 per cent or partially. As to the use of private cars by coal operators, I do not think there are any private cars used on the Southern Railway system.

By Commissioner ATTCHISON:

I do not know why. Our (905) policy with respect to treating these assigned cars if they are offered to us, I think would be to place them at the mine to which they were billed and preserve their identity.

By Mr. RIXEY:

Foreign lines send practically no cars to Southern Railway
1909 mines for foreign line fuel loading. There are very few cars so sent. I think perhaps the Central of Georgia may send a few, and the Seaboard occasionally; but it is very rarely that we get any of that nature. The Southern Railway owns the Railroad Fuel Company mine at Parrish, Ala. That is strictly a railway fuel mine.

Cross-examination by Mr. BALLARD (906):

I am not in the transportation department, and I am not prepared to answer what is the percentage of commercial supply of coal cars on our line now.

Mr. BALLARD. Could you furnish that, Mr. Rixey?

Mr. RIXEY. I think so; yes, sir [after an aside]. I understand from Mr. Andrews, who is here, that it is about 50 per cent.

Commissioner ATTCHISON. Is that sufficient?

Mr. BALLARD. Yes, sir.

By Mr. BALLARD:

Our fuel contracts do not contain any provision with respect to car supply. As to methods of obtaining fuel for the Southern Railway besides the assigned car rule, which we have tried, we have had the commission's priority orders; we have had to buy coal on the spot market; also confiscation. (907) I have in mind that in the spring of 1918 we made arrangements with the operators around Tennessee to pro rate their tonnage to us to take care of the shortage.

By Mr. RIXEY:

That was when we came out of Federal control, in 1920.

By Mr. BALLARD:

That arrangement lasted for a very short period. I should say ten days, perhaps. I want to say, in regard to that proposition
1910 we had in Tennessee, that we did not get the coal the operators promised us. I do not know whether we are assigning cars in the Alabama field to-day.

By Mr. CURRY (p. 908):

I haven't the number of mines on the Southern Railway, but I would estimate it at about 400. The number of contracts we have let to help out the operators, I would estimate around 60. They are able to furnish us a full amount of coal for our daily requirements, if we can get the cars to them for loading. The assigned

car basis is in effect, but we are not using it to the extreme. We are giving the railroad mines a little preference, but not assigning cars for the full operation. We are applying the assigned car rule under CS-31.

By Mr. LIVERIGHT (909):

At the present time we are giving our railroad mines less than a full supply of cars for their entire output. We do not, in addition to that, give them at any time commercial cars.

1911 (910) D. E. SPANGLER, called as a witness and, having been first duly sworn, testified as follows:

Direct examination (911) by Mr. YOUNGER:

I am general superintendent of transportation of the Norfolk & Western Railway and have been in the transportation department of this railway in an official capacity since 1898. I am familiar with their methods and practices with respect to car-service matters. The Norfolk & Western owns and operates mines exclusively for fuel supply and also contracts for the entire output of other mines. Our practice since 1910 has been to disregard such mines altogether in rating and, on the other hand, to regard the available car supply as the total car supply, less the cars placed at the exclusive fuel mines. (P. 912) Our rule which was practiced in the period from 1910 down to the beginning of Federal control is: "A mine furnishing its entire coal output to the Norfolk & Western Railway for fuel will be supplied with equipment required to receive it, will be eliminated from the mine rating for coal-car distribution, and only the rating of mines loading commercial coal or both railway fuel and commercial coal will be used in the formation of a car-distribution percentage table by which the cars available to such mines shall be pro rated." Whether you regard these cars supplied to exclusive fuel mines as assigned cars, or whether you regard them as not employed in commerce, is a problem of theory which does not affect the practical result. To mines supplying part of their output to the Norfolk & Western for railroad fuel, this company has not since 1910 assigned cars for railroad fuel. Generally speaking, the car supply for mines on our road has been sufficient so that the question of car supply to part-output mines has not been a vivid one with us in the past.

(913) I would like to say that the past practice will take care
1912 of our needs for the future, but of late we have had unprecedented difficulty in making cars go round; and in some important instances our fuel contractors, who sell us only part of their capacity, have suggested the theory that the railroad contracts must suffer relatively with their commercial contract shipments whenever there is a short car supply. Defaults on such theory have necessitated confiscation of the coal. The primary necessities of the railway company and the consequences of an indeterminate fuel supply are so serious that I am inclining to the view that the only effective remedy will be for us to adopt, in time of short car

By Commissioner ATCHISON:

We buy coal from any mine on our railroad that has a quality of coal that we can use. There are only five whose entire output we contract.

By Examiner BARTEL:

The output mines do not cover our needs but provide about one-sixth of our requirements, and the others, about one-sixth. (922) So it happens that we have about two-thirds of our coal protected in that way. We have never had, until recently, difficulty in getting fuel coal, because, going back to the old days, our operators thought it was part of their job to furnish fuel to the railway, and I am glad to say we have a large number of them still; but we have a small minority who have recently begun pro rating our tonnage with commercial coal.

By Mr. CURRY:

I think we have somewhere in the neighborhood of 75 to 80 partial output contracts that cover all the mines on our railroad with the exception of a dozen or so. It would not be feasible to supply our fuel coal by contracts with mines on our lines at a reasonable price, without resorting to the assigned car rule, unless the contractor would actually deliver the tonnage he obligated himself to deliver. 1916 We are just as good buyers of coal as anybody else and we do not go to any subterfuge to get it. It has turned out that our yearly bargain is better than some that were later made. (923) We have, in the recent past, had some trouble in getting coal from these 75 or 80 mines that we have contracted with. It has necessitated our going to the mine and taking coal which we believed was due us under the contract. That was with policemen. While that is a substantial part, that is only a small part of the total. It was not as much as a third. We get two-thirds of our coal by faithfulness in delivery under contracts. (924) One third of our fuel supply we get from these entire output mines, probably ten of them, and the other two-thirds we get under the partial contract arrangement with the 75 or 80 mines. Now, if default in delivery occurs, we have got to get our coal in some way. We do not have a maximum minimum clause in our contract. We have one tonnage, and we have a clause in our contract which obligates us to take that coal, relatively, when we cannot take the total. So we apply that rule of adjustment whenever the market goes down and our operators have not commercial contracts to keep them going. They participate alike under our contracts regardless of what the price may be. The prices are not uniform at times and sometimes they are uniform with respect to a district. We take our coal under that arrangement, pro rata, based on contract tonnage. We think we are able to secure a fairly reasonable price on these partial output contracts. (925) As to whether we could secure fairly reasonable prices if we sought to secure our entire supply from partial contracts with the mines, it would

depend upon who was going to say what was reasonable. It all depends on the market, of course. In regard to private cars, aside from the policy which I have stated, from an operating standpoint to have them on the line would depend entirely upon the service in which the cars operated and where they were received. We had
1917 three applications at one time for cars. One was a tidewater application for cars to go to the western end of our railroad to get tidewater coal. Another one in particular was for a large tonnage to come into our eastern field to take coal west. That would mean cross-hauling over the most difficult portion of our railroad to operate.

By Commissioner AITCHISON:

To protect the quality when getting coal from so many different mines, we have a clause in our contract something like this: "Coal to be of standard quality of the district in which mined and reasonably free from slate and other deleterious substances." We are able to protect ourselves under that specification. We like to say that on the Norfolk & Western there is very little poor coal, and we do say that there is no poor coal there—if properly and carefully prepared. We have been obliged to confiscate. When the necessity for confiscation comes around you are in a situation like we are now passing through, and during such time coal is not as carefully prepared as when each producer is striving to get his coal on the market. That has given us a great deal of trouble. Our great difficulty in that respect—not getting coal as contracted—is that with out large number of stoker engines we cannot get the particular character of coal we need. (927) For that part of our coal which we take by force of confiscation in order to reach our requirements we have to pay market value. During 1920 the sky was the limit. It went as high on part of the invoices rendered as eighteen or twenty dollars.

By Mr. FLETCHER:

About sixty per cent of the tonnage of the Norfolk and Western is coal. In recent months we have had difficulty in getting cars in place and getting cars back from connecting lines, and our supply has been low in consequence. Ordinarily speaking, we have a fair working supply of cars.

1918 (929) AUGUST G. GUTHEIM, a witness previously called and sworn, was recalled for cross-examination, and testified further as follows:

Cross-examination by Mr. BALLARD:

Referring to Exhibit 16, entitled "Mines owned or leased by carriers," the circular that was sent out for this information asked for mines owned or lease, and the exhibit embodies everything that we got in answer to that circular. I believe Mr. Markham testified that the Illinois Central owned the stock of the Madison Coal Corporation. I think that is true of a number of the roads on this exhibit.

I think that possibly certain companies which control mines by stock ownership, either directly or indirectly, are not included in this exhibit.

By Mr. Brown:

As to the large increase in the total number of private cars used by the railroad companies for private car ownership, not quite double the amount owned in January, 1916 (as shown on the exhibit of privately owned cars), I will give my opinion on it. (931) I testified on direct that up to the time we got into the car shortage of 1916 we had not had a nation-wide coal car shortage in this country more than about ten per cent of the time. Under those circumstances there was not very much inducement to a coal company to invest its money in private cars. Again, for a number of years after the decision in the Traer and Hocking Valley cases, which limited to a considerable extent the rights theretofore enjoyed by private car owners, there was a tendency of the private car owners to rid themselves of private cars. When we got into the car shortage period of 1916 and thereafter there were a number of coal operators who saw the wisdom of again investing in private cars.

1919 That was accentuated by the fact that in our war experience we went into the by-product coke oven business to a large extent, and it seemed to be assumed in the fuel trade that it is pretty nearly impossible to run a by-product coking proposition without protecting your coal in some better shape than you can protect it out of the general distribution of car as we have it now. I think those things together are what have been responsible (932) for the change in the private coal car ownership. As far as I know there was no change in the policy of the railroad companies generally with reference to the use of private cars on their lines. As to the decrease in the number of private cars from January, 1921, to March, 1922, of nearly 2,000, I called attention first to the fact that this information, up to March 1, 1922, is compiled from the Railway Equipment Register, that I believe represents the voluntary act of the private coal car owner in publishing his information. He may do it one year, so far as I know, and not another. I have simply put in here the sum total of the information of the Railway Equipment Register. That may explain it. Then, the March, 1922, figures we got by special reports made to the car service division of the American Railway Association. (933) Further respecting the increase in the number of cars as a result of our war experience, bear in mind that the great expansion in the coal-mining industry during the same period, resulting in a much larger number of mines relatively and a much greater rated capacity, with no increase in the number of railroad cars to speak of, accentuated the necessity, as some of these people thought, of buying private cars. Those that have bought new cars in the last few years I understand have largely bought them for the purposes of by-product coke ovens.

By Commissioner AITCHISON:

I have no doubt that the possibility of obtaining a more full supply than they would have if they were obliged to depend upon the commercial distribution has been a very powerful incentive to inducing certain of these companies to purchase private cars? I have (934) had, I venture to say, a couple of dozen officers of corporations that consumed large quantities of coal come and ask me about the desirability of their buying coal cars to protect their fuel requirements by getting advantage of the assigned car rule.

1920

By Mr. CARMALT:

I would say that the public utility companies were the more numerous among those that have come to me.

By Commissioner AITCHISON:

As to whether the growth of the private assigned car has been greater upon certain lines of railroads than upon other lines, I think it has been greater on those railroads where by-product coking coal is produced. I have not observed the public utility coal so much because the purchase of it is more widespread; but the by-product coking coal is a more closely knit proposition. (935) With respect to the growth in the number of private cars used in eastern Kentucky, I do not think, from my observation, it has been any greater there than it has been in one or two other places. I think the effect of it has been accentuated there because there have been other things that have contributed to difficulties that resulted. For instance, a greater expansion of the coal business, a greater number of mines, and the greater rating to be served with no greater or commensurate increase of railroad facilities to serve them. The use of the private car has not been as widespread as the coal industry. It has been confined to particular sections. I would say particularly southwestern Pennsylvania; some in northern West Virginia, and then more particularly southern West Virginia, southwest Virginia, and eastern and southeastern Kentucky.

1921

By Mr. LIVERIGHT:

There has been a tendency of the private car owner to rid himself of his cars over a series of years, up to the time we got into the car shortage period beginning in 1916. After that they wanted not only to retain their private cars but in some cases to buy them back. In your territory the Pennsylvania Coal & Coke Corporation, Mr. Thomas Watkin's company, which rid itself of its private cars years ago, is now in the market for them again. I understand they have just bought a thousand. Our Exhibit 14 was compiled from information reported weekly by those railroads to the American Railway Association, car service division.

1922 JOHN CALLAHAN, called as a witness and being first duly sworn, testified as follows:

Direct examination by Mr. BALLARD:

(941) I am traffic manager of the National Coal Association, Washington, D. C. This association is a non-profit corporation whose 1,800 members have bituminous coal mines in 23 bituminous coal producing sections of the United States. The aggregate production of the association's membership represents at least 60 per cent of the total commercial tonnage of bituminous coal produced in this country. I speak only for the members of our association, and do not represent the wholesalers or the retailers of coal or the producers of anthracite. It is a bituminous coal operators' association. I have been traffic manager of the association since 1917. Prior to that time I had been continuously employed by the Pennsylvania Railroad for 25 years. My service with the Pennsylvania covered a wide range of activities (942) all of which were in connection with railroad transportation. My duties as traffic manager of the National Coal Association pertain to every aspect of the transportation of bituminous coal by the carriers. My testimony will relate only to home line and foreign line assigned fuel cars. I have no authority to testify with respect to the assignment of private cars or their use in any respect. A study of the problem of coal car distribution should commence with at least brief consideration of the broader problem of the supply and distribution of open (943) top cars to all users of such equipment. By far the larger portion of the coal produced in this country is transported in open top cars. Such of it as moves in other kinds of equipment is governed by special circumstances not affecting the general problem and may therefore be ignored for the purpose of this case. That means box cars. Ordinarily the peak point in coal production is reached coincidentally with the peak demand for open top
1923 cars by other kinds of traffic. This is true because activity in the coal business is necessarily preceded and accompanied by activity in other basic industries, and the open-top car is an essential part of the transportation service of practically all industrial activities. In addition to coal, the open top car is used to carry steel, lumber, stone, sand, ore, vegetables, and a host of other commodities. I will file at this point a statement I have prepared of a large number of commodities that can be and are moved in open top cars.

(This statement was offered and received in evidence as Exhibit No. 29.)

(944) It follows from the general utility of the open top car that the first problem presented in connection with its distribution is the proper division of the total supply among the various classes of users to whom such cars are essential. That is, coal shippers and other shippers. This is complicated by the lack of any common measure of the transportation necessities of users of open-top cars

and the consequent impossibility of determining with accuracy whether or not a fair division among them has been made. As a result of this inherent difficulty we are not in a position to prove that in the past the shipper of coal has received less than his just share of open top equipment. But we can demonstrate that the carrier is under the strongest possible incentives to prefer the non coal user of open top equipment and under no incentive at all to give the coal user his fair share. This grows out of the unique and helpless situation of the coal shipper as a patron of the railroad. The location of his business is fixed by geological conditions, and therefore (945) is not subject to change. No matter how bad the railroad service he receives, he cannot move his plant elsewhere. In the majority of cases he does not even have the advantage of
1924 choosing between two railroads serving the same locality for he ordinarily cannot reach more than one. Neither is there any elasticity in the movement of his product, as the operation of his property is dependent upon daily shipment. For all these reasons, competition in service, the only remaining competive force to which carriers in this country are subject, operates generally against the interest of the coal shipper. This serious situation is accentuated by the fact that practically every commodity other than coal which customarily moves in open top equipment pays the carrier more than coal. It is obvious that the railroad official is inclined to favor the higher rated shipment in open top equipment to the prejudice of the coal shipper. The ratings of those other open top commodities are shown in our Exhibit 29.

By Examiner BARTEL:

(946) A great many of them move under commodity rates so these are not the rates on which they would move. These are simply classes. This is intended simply to show the classes in which the railroads classify them. This tendency (to favor the higher-rated commodity) finds concrete expression in the difference between the activities of the local agent at a point where general traffic originates and the local agent at a coal-producing point. Local agents of the first class are selected with a view among other things to their business-getting ability. One of their duties is to solicit traffic from all shipping interests in their locality and this traffic requires equipment of all kinds. The existence of a surplus of open top equipment during certain periods of the year has led to a rapid development of its use (947) in recent years for many kinds of commodities which were formerly moved in closed cars. Therefore, the open-top cars loaded with coal which necessarily arrive at every railroad
1925 point in the country are, when made empty, in demand for outbound shipments. Pressure of every kind is brought to bear on the local agent and his superiors to secure the use of such cars for outbound loading irrespective of their return movement to the mines. On the other hand, the local agent in a coal-producing district exercises no such activity toward increasing the supply of

open-top equipment for coal. The result is a widespread and constant drain on the supply of open-top cars available for coal loading. If the carriers know that the protection of their own fuel supply is wholly unrelated to the provision of adequate open-top equipment for the movement of coal generally and that they are in a position from day to day to protect the movement of their own coal to the exclusion of coal for every other use, the inevitable tendency will be to maintain the supply of coal cars at the lowest possible point consistent with the continuation of general industrial activity. On the other hand, if the railroads are required to secure their fuel by the nondiscriminatory use of their transportation facilities, just as they secure all other materials and supplies which they consume and just as other public utilities (948) and industries secure their fuel, they will be under a strong incentive to treat the coal shipper and consumer fairly in the matter of the allotment of open-top equipment. Whenever the supply of cars available for the movement of coal is not equal to the demand it is necessary to distribute such cars among various classes of shippers within the coal industry. On some railroads, as the record in this case shows, the methods used in the distribution of cars to coal producers supplying the railroads with fuel do not vary from the methods used in distributing cars to coal producers who sell no railroad-fuel coal whatever, thus demonstrating that railroad fuel can be (949) obtained without special preference in car supply to coal mines.

1926 Much of the railroad fuel of the country, however, particularly east of the Mississippi River, is obtained with special preference in the distribution of cars. This special preference is accorded by the use in one form or another of the assigned car. In the proposed revision of C. S. 31 (revised), rules 8, 9, and 10 provide for the use of asigned cars. They are authorized in the form ordinarily referred to as the rule in the Truer case without any limitation as to the amount of coal which must be purchased from a mine in order to authorize it to receive them. That is, as I understand it, without the six months output contract limitation. I wish to outline in general terms the evils of this practice from the standpoint of the coal operator. The coal operator is dependent, to a greater extent than any other class of shipper, upon current transportation in order to enable him to keep his plant in continuous operation. Steel companies, lumber mills, manufacturers (950) of all kinds, farmers, and every other important group of shippers are able to continue production to full capacity for a substantial period, whether or not transportation is immediately available, because of their ability to store their product. This is not true of coal producers. It is usually impracticable to store coal at the mine after it has once been removed from the ground, and the mine's daily operation therefore depends upon a daily car supply. The topography of the ground surrounding the mouth of the mine is frequently such as to render impossible the storage of coal. However, irrespective of this consideration, storage

at the mine is utterly futil' from an economic standpoint. The coal is already stored in the ground and can be produced without delay whenever transportation is available and a demand for it exists. Nothing whatsoever is gained by removing it from the ground
1927 and piling it beside the mine mouth. It will only move thence at times when there is a heavy demand for coal and at such times railroad facilities are always at a premium. It follows that to whatever extent the storage of coal above ground is necessary it should take place at the point where the coal is to be consumed, as only in that way can its ready availability be assured. This not only increases the amount of available coal when the coal demand is at its height, but reduces the amount of transportation necessary for coal when the demand for transportation is at its height. Not only are the railroads essential to the daily operation of a coal mine, but they are one of the coal mine's customers. Regardless of general business conditions the carriers are always large purchasers of coal, and this is one of the large items in their budget. They naturally wish to buy it as cheaply as possible. The coal operator from whom they buy must make every effort to secure all the cars he has need for. The result of this situation is that the railroads as purchasers of coal constantly seek to capitalize their position as carriers of that commodity by holding out as an inducement to the seller preferential treatment in the matter of car supply. This practice partakes of the same nature as the rebates and discriminations which prompted the original enactment of the interstate commerce act. A preferential rate to a steel company supplying a carrier with rails, or to a stone quarry supplying it with ballast, or to a lumber mill supplying it with ties, would be just as fair and reasonable as is the giving of a car supply in excess of its pro rata share to a mine supplying the carrier with coal.

1928 By Examiner Baetel:

If you give one shipper (952) cars and deny his competitor cars, and continue that for a period, it will put him out of business just as surely as rebates did. That is not argument. It is experience with some people over a period of time, at least.

By Mr. Ballard:

The assignment of cars for railroad fuel results in giving to mines receiving them full running time, or at least substantially greater running time than the commercial mines in the same district. Out of this inequality in running time grow all of the evils of the assigned car. The first and most obvious one is the relative effect on the two classes of mines in the matter of cost of operation. The unit costs of the assigned car mine are reduced, the unit profits increased, and the volume of output on which these profits are realized greatly enlarged. At the same time there is a corresponding increase in the unit costs of the commercial mine, a decrease in its unit profits and a curtailment of its production. This, of course, carries with

it curtailment of supply for commercial consumption and an increase in commercial prices. The Government recognized this when it lowered the Government price on all coal during the war coincident with the elimination of assigned cars. (953) In another important manner the assigned car mine receives an immense benefit and the commercial mine suffers a serious hardship from this practice. The inequality in running time is a constant source of labor trouble due to the fact that miners are paid on a quantity basis so that the fuller the running time of the mine at which they are employed the greater is their potential earning power. The result is that the most industrious and efficient miners are attracted from the commercial to the assigned car mine and the latter is able to obtain a comparatively fixed supply of high grade labor, while the former
1929 suffers from a rapid labor turnover and a decline in efficiency and morale. In fact, the assigned car mine has been known to refer to its fuel contracts and promise full running time in advertising for labor. The assigned car also has a serious effect on the development of mines whose proportionate distribution is impaired by its use. Normal development is retarded and the profitableness of the operation so reduced. Furthermore, the period necessary to recover all of the coal in a given operation is lengthened and capital cost per ton thereby increased. Loss and expense also result in connection with what is known as pulling pillars; that is, the recovery of the sections of coal standing between rooms which are necessarily (954) left to the last before being mined. In considering certain aspects of the assigned car it is important to bear in mind two different connections in which it is used, namely, for the transportation of contract coal and for the transportation of spot coal. The majority of the fuel coal of the carriers of this country is purchased under contracts ordinarily running from April 1st to March 30th, which, under the trade practice, is the coal year. These contracts are, therefore, closed at the time when coal is in poorer demand than at any other season, and in this respect the situation favors the buyer. While, as indicated, heavy tonnages of coal are usually taken through the use of contracts there is no general fixed rule on this for the country as a whole, nor is the practice uniform from year to year. For example, in 1919 the carriers purchased by contracts 86.8% of the 123,907,508 tons of coal they used, and purchased 13.2%, or 16,381,503 tons, of coal in the open market, while in 1920 they took 80.7% of the 153,343,635 tons of coal they bought by contract, and that year purchased 19.3%, or 29,857,080 tons, in the
1930 open market. The 153,000,000 that I gave represents the total consumption of all carriers. (955) Nor is there apparently any fixed policy with particular railroads as to purchasing by contract in preference to purchasing on the open market. In 1919 New England roads purchased 69.8% of their bituminous coal requirements by contract. But in 1920 they purchased only 54.6% of such requirements through the use of con-

tracts. There appears to be a growing tendency on the part of the carriers to buy coal on the spot market instead of under contract. In October, 1921, the carriers purchased 9,979,023 tons, or 77.3 per cent, under contract, and 2,923,716 tons, or 22.6 per cent, on the spot market as appears from their exhibits in "Reduced rates, 1922." This indicates a substantial increase over 1920 when the percentage of spot coal was 19.3 and an even greater increase over 1919 when it was 13.2 per cent. There is little to choose between the use of the assigned car for spot and contract coal. In the case of spot coal the operator who sells no coal to the carrier is subjected to the killing competition of neighboring operations which enter the commercial market a few days every week and receive the artificial support of assigned cars and consequent full running time on other days. The argument is sometimes (956) made that this difficulty is avoided by requiring the operator who is going to sell fuel to the carriers at all to sell all his output for six months or a year.

By Examiner BARTEL:

I am informed that when the carriers take a partial output they assign cars for a given day and the next day send to the commercial field and do not equalize.

By Mr. BALLARD:

The six months rule alters, but does not eliminate, the vices
1931 of the situation. Under such a rule the operator owning but one mine must elect between a complete severance of all his commercial connections and a complete renunciation of the assigned car. On the other hand, his competitor who operates more than one mine is in a position where he can continue in both kinds of business and enjoy the advantages of both. This is serious enough even when the output rule is applied to each of such competitor's mines, but when, as under Service Order 18, the operator with a number of mines is permitted to make output contracts for certain of them and then pool the cars assigned under such contracts with those furnished to his other mines for commercial (957) loading, his single mine competitor is subjected to all of the disadvantages both of the output contract system and the spot market system and is in an intolerable position.

1932 (957) This is a copy of a letter from Chairman Clark to Mr. Willard of Oct. 11, 1920, and was copied from a copy in the files of the National Coal Association, which was sent to the Association by Chairman Clark.

(This copy of letter was offered and received in evidence as Exhibit No. 30.)

On the other hand, the larger operator with a number of mines is in a different position if he is required to confine his assigned cars to the mines having output contracts and operate his commercial mines on short time. Another grave injustice grows out of the output contract rule. Many of the operators specialize in domestic coal

and have prepared themselves for its production by the installation of proper machinery. (958) During the domestic coal season they sell the prepared coal sizes for that purpose and the screenings for other purposes. This class of operator is essential to the supply of the domestic coal market of the country. At the close of the domestic season this man can not put his prepared sizes on the railroad fuel market under the six months' output contract rule for two reasons: In the first place, he can not afford to enter into a six months' contract, and in the second place, he could not dispose of his screenings if he did so. In another respect the output contract rule involves great difficulties. Some roads will buy nothing but prepared sizes of screened coal when they can get it; others purchase run-of-mine coal and screen and crush it themselves, using the prepared sizes for locomotive fuel and for heating of buildings and the screenings in their shops. In the latter case the output contract rule is capable of enforcement, but in the former case the operator is left with screenings on his hands which he has no way of shipping unless he is either given commercial cars or given assigned cars for commercial shipments, either of which practice would violate the rule.

What I have said relates to the assigned fuel car whether
1933 it is for system or foreign line coal. The resulting evils are to a very large extent the same. There are, however (p. 959), certain aspects of the foreign line assigned car which require separate consideration. The decisions of the commission as we understand them require that where cars of one line are sent to another line for fuel, such cars must be placed at the mines to which they are carded and with which purchasing arrangements are made. This rule has frequently been disregarded. Some roads place such foreign line fuel cars at the mines nearest the junction point at which they are received. They then place home line or system cars at the mine which is to ship the coal to the foreign line. The net result of this practice is to materially lessen the already short car supply of the home line, for the practice occurs usually when the home line is congested and has more business than it can satisfactorily handle, which is the case invariably when cars are short. The car supply of the home line is diminished by reason of the fact that the foreign line car, as car service rules provide, is loaded to or in the home direction and thus saves per diem, while an equal number of home line or system cars go to the foreign line with its fuel. The assignment of foreign line fuel cars involves other special evils whether or not the identical cars are placed. Many noncoal loading roads do not own an adequate supply of open top cars, but depend upon the equipment of the lines serving the mines for their needs in this regard, both for
(960) commercial shipments and their own fuel coal. It is essential to all roads to have a mobile supply of coal on hand at all times, the amount depending upon the volume of fuel which they use and the distance from the source of supply, and the use of foreign equipment for this purpose depletes to that extent the coal car supply of

the lines serving the mines. Another difficulty growing out of the assignment of foreign line fuel cars is that they sometimes replace an equal number of commercial cars which would otherwise be subject to pro-rata distribution. This is so when the coal loading
1934 road equalizes its car supply among divisions and therefore, when it receives a number of foreign line fuel cars for loading on one division, transfers some of its commercial cars to some of its other divisions to keep the distribution equal. This obviously is to the detriment of the commercial operators since they are deprived of some of the commercial supply and receive none of the foreign line fuel supply. In fact there are so many disadvantages to the assigned foreign line fuel car that certain operators decline to accept foreign line fuel contracts in spite of the car-supply advantages to themselves which they entail. Many large steam railroads in this country and enumerable other public utilities secure at all times an adequate (p. 961) and regular fuel supply without the use of the assigned car. Every railroad in the country should be required to follow this course. If this is done the problem of the production and distribution of commercial coal will be immensely simplified. At the same time the coal-consuming public will be relieved of the wholly unjustified additional cost which is now assessed against it as a result of the prejudice to which its coal is subjected in the matter of car supply. The first measure necessary to be adopted by a carrier in order to assure itself of an adequate fuel supply without the assignement of cars is to spread its fuel contracts among a sufficiently large number of the mines which are in a position to furnish proper coal so that the production of those mines on the expected car supply will meet the railroads' needs. Such contracts should include provisions entitling the carrier to the first coal produced each day up to the amount of the order and the other contracts made by the mine should, and can, carry a clause which makes them junior to the railroad fuel contracts. This system is in widespread use in the West. Another system of car distribution which has been used extensively in the past, and is still used by some lines to a substantial extent and which does not involve the use of the assigned car in the ordinary sense of
1935 that term, is the idle-hour system. (P. 962) In this system, averages and shortages occurring in any one week, as the result of assignment of fuel cars, are equalized during the next week so that at the end of any by-weekly period all mines served by the carrier involved have had their pro rata share of all available cars. As an illustration of this I will file a copy of C. & S. Railway car-distribution rules dated July 20, 1912.

(P. 963) The paper referred to was offered and received in evidence as Exhibit No. 31.

The subway elevated and street railway systems of our great cities, the electric companies and gas and water plants which serve them, and the vast network of interurban lines, many of which

transport freight, are as vital to the life of the Nation as are the trunk-line carriers. An interruption of the service of the Interborough Rapid Transit Company of New York, or the Commonwealth Edison Company of Chicago, or of any one of a dozen other similar utilities which could be mentioned, would be more disastrous than the discontinuance of much of the railroads' service of the United States. Yet, such utilities secure their fuel through ordinary commercial channels by contracting for it in adequate amounts in advance, without the use of any transportation preference whatsoever. In purchasing fuel coal they are on a parity with the steel mill and the factory. If such utilities, and if numerous steam and electric roads in this country are able (p. 964) to secure their fuel coal without the use of the assigned car, there is no reason why it should be permitted at all. One of the claims that has been made here in justification of the practice of assigning cars is that it avoids the necessity of confiscation. This has not been the case in the past. In spite of the fact that the commission's order of April 15, 1920, contained a recital that one of its purposes was to avoid the necessity for this practice, it was indulged in to a very large extent during the life of the order. The total amount of confiscation which then occurred can never be ascertained, but I have reports from a few members of the National Coal Association showing that thousands of cars were confiscated during sixty days following the issuance of the order. For example, during that time the Baltimore & Ohio confiscated 765 cars of coal, of which we have a record; the Louisville & Nashville 259, and the Chicago, Burlington & Quincy 511. These represent only partial reports, even as to those roads. It is thus clear that the assigned-car order of April 15, 1920, by no means did away with confiscation. I now desire to file as an exhibit a chart showing the car supply of the United States from 1907 to 1921, and the coal-car supply from 1918 to 1921. The American Railway Association was the source of the information on which this chart was based.

1936

(P. 965) (This statement was offered and received in evidence as Exhibit No. 32.)

It will be seen that the relation between the coal car supply and general car supply during the years for which both are shown is fairly constant so that the exhibit may be taken as indicating the situation with respect to coal cars during the entire period covered. This chart demonstrates that from 1907, when the Hocking Valley case was decided, to the latter part of 1916, when this country had begun to feel seriously the abnormal effects of war production, there was never a general coal car shortage of substantial duration. In fact, with the exception of the latter part of 1912 there was never any general coal car shortage up to 1916. It thus appears that for practically ten years after the decision in the Tracy case was announced there was no national occasion for its application and no means of knowing whether or not it was suited to a national car shortage.

1937 (966) It is therefore fair to say that the rules announced in 1907 and 1908 in two purely local controversies did not during the succeeding ten years receive any broader practical test than the situation which brought about their announcement. During the latter part of 1916 and 1917 there was a continuous coal car shortage. During this time the rule in the Traer case was being observed throughout the eastern section of the country to provide fuel for the carriers during the general coal car shortage. However, this car shortage wholly disappeared in April, 1918, and before it occurred again in 1919 the railroad administration had ordered the complete discontinuance of the assigned fuel car. Since the close of Federal control the question has been in a constant state of flux and the coal operators of the country during that entire time have been doing everything in their power to bring about an abandonment of the rule in the Traer case. From early 1921 and until September, 1922, there was, generally speaking, a car surplus so that the problem of coal car distribution was not acute. Commencing with the settlement of the strike at the end of August this year, coal production shortly increased, and a car shortage soon developed (967) which has now reached an acute state. I have gathered together some statistics from individual members of the National Coal Association and incorporated them in exhibits. These are compilations of data which we have gathered, so far as possible, from various districts east of the Mississippi, and they give a composite picture of the practical effect of this practice on the supply of cars to mines. The data used in compiling these exhibits were submitted by local associations and operators who are members of the national association and in response to a questionnaire which I prepared and circulated among them. All of the data was
1938 received and consolidated in my office under my supervision, much of it being handled by me personally. In their final form these exhibits represent my analysis and compilation of the data furnished in response to the questionnaire. The first statistical exhibit is a comparative statement showing cars available for loading by typical assigned car mines as compared with cars available for loading by typical competing commercial mines.

(The statement referred to was offered and received in evidence as Exhibit No. 33.)

(968) This exhibit shows the railroad division of coal producing districts; in column 3 the mine; in column 4 class of cars used; column 5 the period or month; column 6 the rating or order where less; column 7 cars available for loading, and in column 8 the per cent of cars available for loading to rating or order where less. The first column shows the Pennsylvania Railroad, two mines, an assigned mine, and a commercial mine; Maple Glen being the assigned mine and the Diamond being the commercial mine. In the month of July, 1920, on a rating of 130 cars that assigned mine received 151.9 cars or 116.8 per cent of rating. The Diamond mine, which had an even higher rating, 508 cars, but was a commercial mine received but

69.2 which was 13.6 per cent of its rating. The first per cent between these two mines illustrates (969) the way the whole exhibit is made up. Referring to illustrations from other railroads, the Echols mine on the Illinois Central, in Kentucky, is an assigned mine which, in October, 1920, on a rating of 364 cars, received 343, or 94.2 per cent; while its neighboring mine, the Rockport, a commercial mine, in the same month received 165 cars or 45 per cent of its rating.

1939 This column, cars available for loading, represents the accumulated total of cars counted against the mine each day during the period covered, and there is a note on the third page which is referred to at the top of each page.

By Mr. CURRY:

Wherever it was possible we eliminated private cars and so far as I am aware there are no private cars on this statement. On page 2 of the exhibit attention is directed to the seventh illustration, a mine of the Baltimore & Ohio Railroad, on the Charleston division, the Strader mine, assigned, (970) with a rating of 102.6, received 121 cars, or had available for loading 121 cars, which was 117.3 per cent of its rating. The Vendee mine, alongside of it, with a rating of 288.9 cars, received 113 cars, or 39.1 per cent of its rating. An illustration of the C. & O. is the Birchton, an assigned car mine. In May, 1920, with a rating of 126, it received 152 cars, which was 120.9 per cent, while its neighboring commercial mine, had a rating of 348 cars and received 124.4, or 35.7 per cent. On the T. & O. C., southern Ohio, the Ohio colliery No. 268, an assigned car mine, in September, 1920, with a rating of 340 cars, had available 335 cars, or 98.5 per cent, while the neighboring commercial mine, in the same month, with a rating of 416 cars, had available for loading 240 cars, or 57.7 per cent. These illustrations are all the same. (971) The next statistical exhibit covers the same mines as on the preceding page, but is enlarged to give additional information in connection with the use which these two classes of mines make of the cars supplied to them. The last two columns show the percentage of cars loaded and cars available for loading, and the number of cars available for loading and not loaded.

(The statement referred to was offered and received in evidence as Exhibit No. 34.)

1940 As an illustration, this exhibit shows that Sumner No. 2 mine an assigned car mine, loaded 67 per cent of the cars available and had left over 194.7 cars. Its neighboring mine Driftwood, a commercial mine, loaded 97 per cent of its cars and had left over 9.4 cars. The same situation (972) applies all through and on the third page, in note 3, it is shown that 46 assigned mines had 2,829 cars left over; 40 commercial mines had 878 cars left over; 13 commercial mines had no cars left over; and 8 assigned mines had no cars left over. Sometimes these cars come in late and in inadequate numbers and this prevents men from going down in the mine; and that was the case with a number of illustrations used here.

developed on inquiry as to why cars were left over at commercial mines. Moreover, cars are sometimes placed in excess of the commercial mines' ability to load them on the day received, and attempt is made to overcome the shortage created previously in the month, and the cars are placed in larger quantity than the mine can load them. I have a similar comparative exhibit in terms of mine time; that is, time worked.

(The statement referred to was offered and received in evidence as Exhibit No. 35.)

(973) This deals with one of the features that is one of the most far reaching in the disturbance caused by the assigned car rule, namely, the number of hours worked in the assigned car mine as compared with the hours worked at a neighboring commercial mine. This exhibit covers a large number of mines in various sections of the country east of the Mississippi River, and speaks for itself. I have prepared an exhibit on the percentage of car supply of the Burlington Railroad since the current car shortage in September, which is a statement of coal cars required and placed at mines of that railroad by weeks, for the period, week ended September 2 to November 4, inclusive, 1922. This information was taken from
1941 reports of the American Railway Association, car service division.

(This statement was offered and received in evidence as Exhibit 36.)

(974) In regard to the foreign line railroad and its ability to get coal, one of our beliefs and opinions is that the foreign line railroad does not adequately supply itself with coal-carrying cars. Without giving a large number of illustrations in detail I would like to refer to the Atlantic Coast Line which had 31,080 cars of coal in 1920. The Coast Line so far as I am able to determine, owns about 917 coal cars, that is, hoppers, and had each of these cars made a round trip each two weeks it would have amounted to 23,842 cars. Thus 7,238 more cars were used than could have been furnished by the A. C. L. for its fuel supply. The Boston & Albany used 14,754 cars in 1920; that is, 50-ton cars of coal. It owns 179 coal cars—hopper cars. It has some gondolas, it is true; but had each of these coal cars made a round trip to the mine every two weeks it would have resulted in 4,654 cars, and thus 10,000 more cars were used than could have been furnished by the Boston & Albany from its own ownership. (975) The Bangor & Aroostook owns no coal cars at all. It has thirty cars which are in the shape of flat and gondolas and it used 2,189 cars of coal on the 50-ton basis in 1920. Of course the Bangor & Aroostook does not get its coal except on very rare occasions on an all-rail haul. Had the Seaboard Air Line used every coal car it owns; and had each car made 26 trips in the year, they would have moved 25,818 cars of coal in 1920. They used 25,599 cars on a 50-ton basis. There are other illustrations of this kind and these illustrations, so far as the movement of cars is concerned

1942 assume that all of these cars were in good condition and would have been kept in continuous service throughout the year.

Cross-examination by Mr. FLETCHER:

The National Coal Association represents sixty per cent of the commercial tonnage of bituminous coal. (976) There are mines which belong to steel companies and other (976) which we refer to as captive mines, and those mines do not hold membership in the National Coal Association. This association takes no position on this private car question.

By Commissioner AITCHISON:

As to why our association has so definitely spoken with respect to certain of these assigned cars but has no expression with respect to others of them, we have had a very pronounced difference of opinion, more pronounced I would say in regard to private cars (977) than with regard to assigned cars; and the board of directors have just prevented me or denied me the authority to speak in regard to private cars. In respect to what has preceded I am voicing the views of the association and they are my views and facts as I understand them. These views are not unanimously entertained by my association. There are some people in the association and some people out of the association in the industry who differ, just as men differ on all large questions of this kind. (978) I never took a straw vote or never took any vote as to how many of our people wanted assigned cars and how may did not, but I have been guided by the wishes of our board of directors, which unanimously moved to attack and have eliminated the assigned car, if that is possible. As to the private as-
1943 signed car I do not know that it is a fair statement to say that the board is divided. They just moved that when this matter was under discussion, and passed a resolution, moved and seconded, that they would not speak on the private-car feature of the assigned-car question.

By Mr. BALLARD:

(979) The question of the attitude of the association on the assigned fuel car has, I think, twice been laid before a full meeting of the association as distinguished from the board, at Atlantic City in 1920 and New York City in 1921. Those were annual conventions of the National Coal Association membership. The resolution reads:

"Your committee believes that the practice of assigned cars is contrary to the best interests of the consumers, the miners, the operators, the carriers, and the public, and is producing dangerous and widespread discontent and unrest among mine labor, and is contrary to the interstate commerce act, recently amended.

"Your committee, therefore, recommends that the general counsel of the association be instructed to take immediately (980) all proper steps to establish the illegality of the practice of assigned cars and bring about its discontinuance."

That is the resolution passed in 1920 at Atlantic City.

The resolution passed in New York in 1921 reads:

"I move that we reaffirm the declarations of this association of one year ago; that we indorse Chairman Bradley's attitude on the assigned-car proposition; that we instruct the committee on railroad relations to appear before the Interstate Commerce Commission and oppose the practice of assigning cars for railroad fuel uncompromisingly."

By Mr. FLETCHER:

The resolution offered in 1920 was put to a vote, and I think it was unanimous. The records of the association, as I recall
1944 them, show it was unanimous. Everyone had an opportunity to be present at the convention. There was no poll of the membership by letter. When we passed the second resolution in 1921 (981), as I recall, that also was unanimous. My opinion is that numerically the majority of the members are opposed to the assigned cars, as I have expressed it here. I cannot say how it would be as to tonnage produced; that is how they would stand if we were to poll the members of the National Coal Association on that. (982) I said that the majority of the bituminous-coal production was from mines which were local to a single railroad. I have no information as to the percentages, but I know that the major production is in what we term the Appalachian system of mines, and in that system the joint mines are confined largely to two or three railroads. (983) I have no figures to substantiate that statement, I might say. I think the assigned-car practice is more generally in use east of the Mississippi River than it is west of the Mississippi River, because it has been encouraged over here in this section of the country and has been relied on by the carriers, whereas west of the Mississippi River they have not found it necessary to do this. Their relationships with the operators are generally somewhat different from what they are in the East. It is true they have had a less serious transportation situation generally than they have had east of the Mississippi River, at critical times, I mean. (984) As to causes, I do not know any reason, other than just a general following of lines of least resistance by the carriers in the East. I would say that easily 70 per cent of the bituminous production is east of the Mississippi River—possibly it is more nearly 80. That is confined to a comparatively small territory, as compared with the great western territory west of the Mississippi River.
1945 It undoubtedly would have something to do with the production of car shortages in the particular territory and the consequent necessity, from the viewpoint of the railroad, at least, of assigning cars. (985) As to whether the railroad uses its car supply freely to get ties, my experience in that regard is that it only does that when there is a surplus of cars, and then ordinarily sends cars which can not be used otherwise.

By Commissioner AITCHISON:

As to fuel-oil cars, I never had anything to do with a road which directly used fuel oil, and I do not know about that. But I know that so far as the other railroad supplies are concerned I am not acquainted with any railroad which assigns cars for those.

By Mr. FLETCHER:

I assume it sends cars and gets its needed materials whenever it has to have them. That is what the railroads are doing in the case of the fuel here, particularly where you have a railroad that owns its own mines. (986) That is largely the same proposition, but it is not in any way one that applies in the coal business. The principle is substantially the same, I suppose, where they do it. As to whether I have any serious objection to the railroad being allowed to furnish cars to its mines which it owns, assuming that it has a fair supply, a sufficient supply for the purpose, I think the common-carrier rights of the public should be respected so long as you can keep the railroad open. (987) I think it is unmoral for a railroad to assign cars for its own fuel where it owns the mine and the mine is partly in the commercial and partly in the railroad fuel business. (988) My association makes no distinction in regard to the use of the assigned car in enabling a railroad to get fuel from a mine owned by the railroad and not in the commercial field and
1946 assigning a car to a mine, whether owned by it or not, that is partly in the commercial field. They think they are equally objectionable. Our association does not recognize the right of a carrier to use its cars to get its own fuel from its own mines, even if it has a legally sufficient car supply in addition to these cars. (989) As to a surplus of mine labor, I am not qualified to go into the details of labor things; but I understand there are a lot of mines to-day which are having difficulty in getting labor. There is supposed to be a lot of labor in excess of what there should be, but, frankly, I do not know. I hear a great deal all the time about the difficulty these men are having to get labor now to produce coal, and they are not producing in some fields anywhere near what they ought to be. It is true it is generally understood there is a surplus, or that there are more men in the coal industry than are really necessary. As to my statement that the use of the assigned car prevents a man getting a dependable supply of good labor (990), I have never worked in a mine, I have never managed a mine, but I have had information which has been supplied to me on the subject.

By Commissioner AITCHISON:

My answer is: I do not know.

By Mr. FLETCHER:

On the question of the increased cost of producing coal due to shortage of running time, I have never figured out the cost in detail. The growing tendency of railroads to buy spot coal is, I think

because they are becoming careless; I think they are playing the market. (991) It does not necessarily grow out of the increasing difficulty to make contracts to get that coal. I think there are too many railroads who are postponing their purchases and buying from day to day, figuring they are going to do a better piece of business that way. As to how it can be brought about that the railroad should be required to make contracts whereby the
1947 coal operator would give him the preference in time of car shortage, in the West, where it is practiced now, the contracts which I have seen are written with a provision that these contracts are junior to the contracts which have been made with the railroads, I mean Kansas, Oklahoma, Missouri, and west of the Mississippi River. They write into their contracts with the commercial user of coal that they will supply him with the coal named in the contract after they have supplied a certain tonnage to the railroads. That is a voluntary action on the part of the coal operators. I cannot imagine how an order could be made requiring them to enter into a contract like that. I do not know that it is necessary to have an order. I think if that was presented to the operators they would be willing to go along with that sort of thing in other districts as they have in the West. It has not been tried to determine whether it is an optimistic view or not over here. There are a lot of utilities which have private cars or which procure power or gas from companies, which companies have private cars themselves. (993) I have not any figures as to the amount taken by private cars and the amount taken on the open market, but I have an opinion. I think by far the majority of coal is taken without the use of private cars, a very large majority of it; in fact, I am sure of that. The private cars which are in that trade do not all run to public utilities, and the production of power, whether it be electric or gas by those plants, is not confined to public utilities. It runs to manufacture and to all sorts of uses. So that I would hesitate to say that the cars could be said to be used principally or generally by public utilities.

By Commissioner AITCHISON:

As to the ability of the public utility to get coal without the use of assigned cars, I do not know of any class of users that is
1948 more prompt to come around to the commission in the time of car shortage than public utilities. (994) They are much in the same position of the railroads. They are habitually depending on some crutch to bolster them up. I do not think the public utilities can be safely left out of consideration as an illustration of getting along without an assigned car rule. They did not have any assigned car in the days before the new service orders. Talking about present days, we hope we will not go along forever with this sort of condition in the transportation world. I admit that for today they do seem to want something of the sort all the time. It is

true, that has been the case in the last three years. The war brough them into a position where they depended largely on other help (995) Whether or not an accentuation of that situation since th inception of the war is dependent on a loss or a shrinking in trans portation, or whether it has not more to do with the increase in th business of the country and in the consumption of power generally and in the advancement that we are making to-day industrially, is a question in my mind. Public utilities are now more keen bidder for coal than they were before the war. They are after more coa to-day, and they are buyers of more coal to-day than they were before the war. It may be true of certain coals that they bid strongly as against each other and threaten virtually to monopolize the field, but as to bidding strongly against each other for steam coals and general purpose coal, I question that. The coal in eastern Kentucky is generally a special purpose coal. (996) And the public utilities are hot after that. The virtual effect of the assigned car there is that one public utility will get the coal rather than some other public utility.

By Mr. FLETCHER:

1949 By chart shows that about the time the periods of coal shortage began to develop, these service orders began to appear. Car shortages made the service orders necessary. It is true that it was because utility companies prior to the service orders got along pretty well, due to the fact there was a period of car surplus all the time. My understanding is that rules 9 and 10 of the idle hour system do not prohibit the use of assigned cars. They provide that any amount of cars left over shall be carried forward and taken into account through the period. (997) The use of assigned cars tends to reduce the necessity for confiscation even if it does not entirely eliminate it. In respect to the statement comparing the performance of mines that have output contracts of various railroads with mines that are in the commercial field I do not recognize it as a fact that the ratings of coal mines were immensely inflated. If it be assumed in some places coal mine ratings were inadvertently inflated, I do not know that there would tend to be a greater inflation in a commercial mine than in an output mine. As to whether the ratings mentioned in my estimate correctly represent the productive capacity of the mine or not, they are the ratings which were used for the commercial and for the assigned mines, and in my judgment they are (998) at least comparative, which is the purpose for which they were used. They are not intended to demonstrate whether the ratings are inflated or deflated. It is not a fact that the ratings of the mines which are exclusively in the commercial field are more inflated than those that are not in the commercial field. (999) I cannot say that my experience would prove it, but it is my belief that proportionately more coal would be produced on short time, three days a week, say, than when a mine is

working full time. (1000) With reference to my exhibit that deals with cars left over, it is not always true that the number
1950 of cars left over will be greater in a mine of large capacity than a mine of small capacity. Generally speaking, I would assume that probably is the tendency.

By Mr. BRONSON:

If any of the mines named in my Exhibits No. 33 and No. 34 as assigned-car mines were developing mines, they were wrongly reported to us. There may be one or two, but I do not know that they are. I was careful to ask that they be excluded. (1001) The mines shown as assigned mines included both the full output type and the partial type. The information in Exhibit 35 with respect to hours worked was obtained in the same manner as the information in Exhibits 33 and 34. When that information came in we had some determination as to how many hours they had reported. They made their reports to the railroads, and those were, generally speaking, the hours that were used. The information was from the affidavits on which the mines were rated. (1002) If the New York, New Haven & Hartford, operating in Massachusetts, owns coal cars for its fuel purposes, we object to the use of those cars under the assigned-car rule. We object to the New Haven sending its cars into the assigned-car train. (1003) I have nothing to say with respect to a gas company in Massachusetts owning coal cars for its fuel purposes. I do not think a mine that is taken right out of the commercial business alters the situation, or that the effect of assigned cars in any number at those mines is less injurious. As to whether a railway should dig its own coal or make contracts for its fuel coal on long term contracts, rather than buy spot coal on short term contracts, I think the railroad ought to contract for its coal the same as other business people do. (1004) If the C. & O. Railway digs about 30 per cent of its own coal, at its own mines, and uses its cars at will to carry that coal to the division termini where the coal is needed for engine tender purposes, I object to that
1951 practice, where following it interferes with the distribution of cars in a nondiscriminatory way. As to a railroad using its cars to distribute coal from its coal storage piles at various points along the line to other places for consumption purposes, it would take transportation just the same. I would not object to the use of cars from the coal piles if you had not the cars at the piles.

By Commissioner AITCHISON:

(1005) As to using cars for sand and gravel, if the railroads assigned them to the mines, to the quarries, I think that is unfair.

By Mr. BRONSON:

As to the use of cars in carrying ties, I have already answered. My opinion is that the railroad has to get its supplies, and we want the railroad to get its supplies and coal.

By Commissioner AITCHISON:

Of course it is necessary to move those ties to the points at which they are to be used.

By Mr. BRONSON:

There is a great difference in principle between moving those ties from a point on the right of way to the place at which they are to be used, and using cars to take coal to the point at which it is needed. The movement of ties from one place on the Chespeake & Ohio Railroad to another place on the Chesapeake & Ohio, as I understand railroad practice, would probably require not to exceed 100 cars a year. And you use coal cars—about (1005) 6,000 cars a month or more.

By Commissioner AITCHISON:

I do not think my association would object to the use of the assigned cars to the extent of prohibiting the Chesapeake &
1952 Ohio from moving necessary coal from a central storage pile in times of car shortage, to the place where intended for current consumption, in order that the railroad might continue to function as a common-carrier. I think it would be unreasonable if they did.

By Commissioner AITCHISON:

(1007) As to whether there is any distinction between coal being accumulated at one central pile and being accumulated at another pile, I am not advised how I can speak for the association in regard to this storage matter. As to my own views I still think the railroads ought to be allowed to get their coal in the manner that would enable them to run the railroads and serve the public without discrimination in the distribution of their cars. I would not object to the use of a railroad's own cars on its own line to keep it performing its function as a common carrier. I would not draw any distinction between the case where there was coal accumulated in one pile and accumulated in several piles. I do not think any distinction can be fairly drawn. (1008) As to a railroad itself digging coal out of a mine, I do make a distinction. I am not prepared in behalf of my association to insure or to guarantee the railroads a full fuel supply in the absence of the free use of their own cars or assigned cars. But I understand it has been proffered to the C. & O. and to many other railroads so many times, and it has not been tried, that I would like to see it tried.

By Commissioner AITCHISON:

In 1920 there was an attempt being made to work that out with respect to the coal supply on the Southern Railway, in cooperation with our association. The association thought they were able to effectuate the arrangement at that time. (1009) I did not come to the then chairman of the commission and express to him our inability

to conclude such an arrangement so far as the Southern
1953 Railway was concerned. It was so far as the general practice was concerned for all of the country at that time. The matter of price was the difficulty which prevented me. It was the advice of our lawyers that I could not discuss the matter of price, which was a necessary factor in the equation.

By Mr. BRONSON:

As to operators not responding to the bids of the Chesapeake & Ohio in March, 1920, I do not know. If a mine selling all its coal to the railroads, by reason of its longer working time, can produce the coal at a lower rate per ton for a lesser cost, I understand it makes a difference to another mine that is out selling its coal commercially in his procuring labor and his staying in the business. (1011) If the Dorothy mine, a C. & O. Company mine, can produce coal at ten or fifteen cents a ton cheaper than a commercial mine that is in business in the near vicinity, the difference is that Dorothy contracts with labor. There are other effects. I do not recall them at the moment.

By Mr. BALLARD:

I was comparing a mine which had developed the same as the C. & O. mines, but of course the extension of those mines would be effected by the comparison. The recovery of the pillars.

By Mr. BRONSON:

I stated that in some cases some of the carriers follow the practice of assigning cars or furnishing cars for railroad fuel under the assigned car rule one day, and not counting the cars, and the next day they furnish the pro rata field share, counting the cars. (1012) I do not know what carriers do it to-day. It has been done since 1920.

1954 By Mr. FLETCHER:

(1014) If, through an order of this commission or otherwise the railroads are prohibited from operating their own mines with a full car supply, and are compelled to go out into the market and buy the coal, either by contracting or by spot, I do not think that the price of coal generally to all consumers would be materially changed. The price to the general public would not be increased if they (the railroads) contracted as other business people do.

1955 (P. 1017) By Mr. CURRY:

"Cars available," as shown on Exhibit 34, includes cars that are placed at a mine in excess of its rating. If a commercial mine has a rating of ten cars and it has fifteen cars placed there, then the fifteen cars would be the cars available, as figured here. And if the assigned-car mine had twenty-five cars placed there and the mine had a rating of ten cars, those twenty-five cars would be "cars available." Under the rules there is no authority for charging

a mine in excess of its rating as to known assigned cars. I had trouble in making the right heading for that column, and had it "charged" for a while and then finally put in there "available." Column 10 says "Per cent of cars loaded to cars available for loading." "Cars available" does not necessarily mean counted under the rules. (1018) My information is that the general practice is to place more assigned cars at a mine than unassigned cars at an unassigned-car mine. Under the rules it is incumbent upon the carrier to place all assigned cars at an assigned-car mine irrespective of whether the number of cars may exceed the rating of the mine; so that, if a mine had a rating of ten cars, and there were twenty-five assigned cars for that mine, the twenty-five cars would be hauled in there, and there would be a large number of left-overs in a good many cases. I think that would be true as to both private cars and railroad fuel cars. (1019) As to wether or not I know of any carrier that has used its assigned-car rule to beat down prices, I never figured in such a transaction. I have heard it said that was the case frequently. I do not know of my own personal knowledge. (1020) The amount of spot coal purchased by railroads has increased in recent years. That may have been in some instances through inability to make contracts by the railroads with the operators, but the impression I have had, not only from our talks with operators, but from what railroad men have said themselves, is
1956 that it was a procedure followed because they wanted to take advantage of any market conditions they could take advantage of. A large number of railroads bid on the spot market this summer and they are still buying that way. They did that when there was a full-car supply. I do not believe it would be fair to say that the railroads waited for a period of car shortage to make contracts in order to use the assigned-car rule. A number of carriers in the West use the so-called preferential contract in the purchase of their fuel. (1021) As to the names of a few of those carriers, I think the Missouri Pacific buys coal that way, and I think some divisions of the C., B. & Q. buy coal that way. I think a great many of the roads that run in Missouri, Arkansas, Oklahoma, Iowa—Mr. Gutheim's Exhibit 18 shows that the Missouri Pacific uses the assigned-car rule.

As to whether these other railroads that use a preferential contract use the assigned-car rule, the C., B. & Q. is indicated here as using it. They may use the assigned-car rule over portions of their system and still use it in this way, on the preferential contract arrangement, elsewhere. I do not know that that is practiced in the States I have mentioned. I think that the railroads could secure a sufficient supply of coal at a reasonable price without the use of the assigned-car rule. (1022) As the best way to do that, I think they should anticipate their wants, and I think they should buy over as large a field as they can and exercise the same foresight and judgment that other large buyers of coal exercise.

By Commissioner AITCHISON:

I do not believe it is necessary for overcontracting.

By Mr. CURRY:

They could avoid the necessity of overcontracting by buying on an anticipated car shortage, if they did anticipate a car shortage.

1957 By Commissioner AITCHISON:

They ought to contract for a year when they do anticipate a car shortage. They are now very adept in anticipating car shortages, as to the maximum and minimum requirements, and they could make a close estimate. (1023) It is pretty difficult nowadays to anticipate the character, amount, or extent of duration of a car shortage, but when we get on a normal basis, and that is what I am talking to, I think it will be easier from year to year to tell for a period of at least six months what you can expect on your railroad under any conditions. Assuming I am able to guess it for six months; to protect the other six months, make your contract for six months with the provision that you can continue it for the balance of the year on the same terms if both parties are agreeable. I will say there is a great deal of that kind of business done to-day, making a contract run for six months, or a certain period of time, and then having it possible to extend it at the option of both parties. And in the event both parties are not agreeable, certain details can be negotiated or renegotiated.

By Mr. BRONSON:

If railroads did overcontract they do not find it necessary in times of car plenty either to take the coal or to pay for that which they do not need. They tell the operator with impunity the stuff is all off; "We do not want your coal, and you can dispose of it otherwise. (1024)

By Commissioner AITCHISON:

As to how I would get the operator to accept the contract, assuming the policy is to distribute orders as widely as possible, it takes two to make a bargain. But the normal condition is for the coal producer to want to sell his coal. Conditions normally are strongly competitive, more strongly than probably in any other industry.

1958 Assuming that the carrier has spread its contracts as widely as possible and has made a contract with every operator; and later other operators open up mines in that field of the same kind of coal, if their quality conditions were comparable with the other coal I would say they would be entitled to participate in that market, and should be compelled to. I see no reason why that would not be possible. The existing contracts would not necessarily all be re-formed on the basis of that within the coal year, but eventually. (1025)

By Mr. FLETCHER:

I think the rules ought to go into effect now if they are ever going into effect. I think we are in a very precarious transportation condition today; probably worse than there will be for years to come. As to whether I want these rules for abnormal conditions and not for normal conditions, when I spoke about normal I had reference to the market, and the competitive condition within the coal industry so far as the contracting is concerned. I was not speaking specifically to the assigned-car rule. I think an abnormal market condition in the coal industry brings about an abnormal transportation condition in the coal industry.

By Examiner BARTEL: (1026)

If a carrier spreads its contracts among the various operators on its railroad, it is true that those contracts would not take the entire output of those mines and the operator would have to contract for the balance of that output and sell it on the spot market. I think if the railroad paid the price the other fellow paid, the operator would realize very shortly on which side his bread was buttered and would give coal to the railroad before anyone else.

By Mr. FLETCHER:

If an operator contracts a part of his output to the rail-
1959 road and the rest of his output to a public utility and a shortage comes along, I would not regard the public utility in any different light than I would the railroad. I would (1027) give them prorata out of that mine. That is not the only mine there that the public utility or the railroad is buying from.

By Mr. BARTEL:

That would not necessarily necessitate over-contracting. There might be a temporary shortage.

By Mr. FLETCHER:

I recognize that there are certain consumers of coal that have just as much right to that coal as the railroads have. If I had a contract for a railroad to take part of the output of the mine and some other essential industry or enterprise the rest of the mine, I would not give the railroad the right to first use of that coal. (1028)

By Mr. CURRY:

As to a carrier's enforcing his preferential contract, I should think he would enforce it in the way any business man enforces a contract. (1029) He takes it up in the courts if the contract is not complied with. I do not mean that now as the thing which should be done, but these railroads today when they have a contract and want to take the coal, they take the coal at the face of the mine, which is not good business, either; but they have means which the average business man has not of taking that coal.

By Commissioner AITCHISON:

That does not apply to foreign coal. That would be more difficult; but he could act through the other carrier and his recourse would be before the law.

1960 Redirect examination by Mr. BALLARD: (P. 1029)

As to employing the method of preferential contracts satisfactorily, all that is necessary is to prognosticate the maximum possible car shortage that may obtain in the period to be covered. If you spread your orders broadly enough so that no coal mine has (p. 1030) more of its output contracted for railroad use than could be furnished under the worst possible conditions that could be anticipated, then you are protected. There are always some mines which can ship coal that would be able to ship coal under this proposed arrangement. It is not expected that the railroads would be able to take the coal from every last single mine on the line. There would be an opportunity for a play there; there would be some leeway. I have no proposal in respect to domestic coal. The domestic coal user gets the coal frequently in a size and quality which the carrier does not use. (1031) The domestic consumer stores coal, frequently for a year. He is not in need of a preferential daily supply. I think that the use of cars to move coal from stock piles to whatever extent necessary could not produce discrimination among mines. Primarily they are located on the lines of carriers which have no coal mines on their roads. And in cases where carriers serving coal mines have such piles, they are at division or engine fueling station points. I would say the ones with which I am familiar are some distance, some considerable distance, from the points at which the coal is produced. (P. 1032) If, under the assigned-car rule of the Traer case, nothing is furnished but fuel cars on Monday, for example, there is no limit to the number of cars which may be furnished, and they may be furnished above the pro rata share. If the same mine is in the commercial business, the next day it gets its pro rata share of the available cars for distribution that day to all mines. If that continued for two weeks the application of rule 10 of Exhibit 31 [the idle-hour code] for those same two weeks (p. 1033) would not produce the same result; and in that case at least rule 10
1961 does not provide for the use of the assigned car as that term is used in this proceeding. In my railroad experience I have never known of the use of railroad cars for ties or ballast or anything else other than coal to have the effect of decreasing the commercial supply, so that commercial shippers who needed cars would not get them.

By Mr. FLETCHER:

The use of open-top cars for other than coal has had no effect on the commercial distribution of cars. The reason is that there are not enough of them used for that purpose.

By Mr. BROWN (p. 1034):

There is plenty of coal in this country, and it can be produced to supply not only the railroads but everybody else. I think it is true that if all the mines are running at full capacity there would be more coal produced than consumed. The question we have here in connection with car shortage is not a question of production but a question of distribution.

W. B. REED, called as a witness, and being first duly sworn, testified as follows:

Direct examination by Mr. BALLARD (p. 1035):

I am an accountant by profession, specializing in coal, having so specialized for the past twenty-two years. I have specialized in cost accounting and have been with the National Coal Association in charge of their cost accounting department for four years from 1917 until the first of July this year, when I went into private practice. I am now in private practice. I went with the National Coal Association in October, 1917, as accounting secretary, and continued (p. 1036) in that position until October, 1919, when I was elected secretary of the association and continued in that position until the first of September of this year. While I was with 1962 the National Coal Association my general duties were the introduction of a uniform system of cost determination among the operators who were members of the association and others. For seven years prior to my connection with the association I was auditor of the New River Coal Company, a West Virginia holding company with some eleven minor subsidiaries, two railroads, wholesale coal company, and two land companies. The New River Coal Company controlled eleven operating coal-mining companies. (1037) Prior to my connection with them I was for twelve years connected with the Pittsburgh Coal Company in accounting capacities, covering almost every class of work. The cost accounting committee of the National Coal Association developed a uniform system of cost determination, which was submitted to the convention in May, 1919, and there adopted. Later, with some additions, it was adopted as a standard for the association by the board of directors. It was put in to an extent very largely at that time, and the work of its introduction has continued up until the present time. I think it is safe to say that probably more than fifty per cent of the membership of the National are using this form or some condensation of it. These three blank forms, entitled "Report of cost, income, and tonnage for the month of ———," and including the income sheets, represent the forms used under this system for reporting costs. (P. 1038)

(These sheets were offered and received in evidence as Exhibit No. 37.)

The letters N, R, E, and X indicate which items fluctuate with production and which do not. The notes are not part of these forms as generally used. They were put there by my instruction and

represent my judgment as to the effect of idle time on each of these accounts. All idle time naturally affects the cost per ton by increasing it, for the reason that some items are of a fixed nature and because of the reduced tonnage output the cost per ton is necessarily increased, with respect to that item and with respect to the
1963 total. A study has been made in the coal industry to ascertain the degree of this effect. The engineers of the United States Fuel Administration made some studies, based on returns from a considerable portion—73 operators in the New River field of West Virginia which they had charted—which are now a portion of the report of this committee of the Fuel Administration. (1040) This chart is a correct reproduction of the chart I spoke of.

(The chart was offered and received in evidence as Exhibit No. 38.)

The legend on the bottom indicates that these small figures, beginning with 100 and running from left to right, show a percentage of decreased car supply. That should be a percentage of car supply, the word "decreased" being surplusage.

By Commissioner AITCHISON (p. 1041):

I am not vouching for anything except the accuracy of this as a copy. As to whether the difference between a 5 per cent and an 8 per cent car supply would affect, according to this chart, an infinite difference in cost, I am only introducing the chart as the result of the work of the engineers' committee. Judging from the chart, they seem to have had only one instance of a car supply less than 25 per cent to base their curve on. I do not know the details of the figures back of this chart. (1042)

By Mr. BALLARD:

I have had prepared an extract from the text of the report of the engineers' committee.

(This chart was offered and received in evidence as Exhibit No. 39.)

There is no other reference in the text of the report to this chart than what appears on Exhibit 39. (1043) Because of the fact that some people misunderstood this chart, it was recharted in a manner which was expected to make it a little more clear. I did not have anything to do with it directly; it was charted under
1964 the direction of the vice president of the National Coal Association. This is a copy of the re-chart.

(This chart was offered and received in evidence as Exhibit No. 40.)

Cross-examination by Mr. FLETCHER:

I was not a member of the firm of eminent expert accountants referred to in the statement copied from the report [Exhibit No. 39]. (1044) I was in the New River field at the time this was made, but these figures were prepared by a firm of accountants who were employed for that purpose, I believe, outside of the association. I con-

tributed to the production of this only by the filing of report of such companies as I was connected with at the time as auditor. If idle time occurred at the same mine on account of reasons other than decreased car supply, the result is the same regardless of what is the cause of the idle time. If the mine broke down or something happened to the mine, I do not know whether that effect would be reflected in this curve; I judge not from the title. (1045) I do not know whether interruptions in the mine were eliminated or not in the making of this chart, or whether anything else was taken into consideration except working time in making up this statement. I do not know of any way of finding out except through inquiry of some of the members of this committee. (1046) The other chart is based absolutely upon this one and whatever is true of one must be true of the other. Starting, say, at $5, just for illustration, as the cost of coal per ton (1047), on a weekly basis of 48 hours a week, and if you then run the mine 3 hours per week it would cost $7.80, or 160 per cent over normal. If you cut your production from 6 days a week to 5 days a week, assuming an 8-hour day, that would be on the basis of a 30-hour week, which would show an increase of about 23 per cent over normal. (1048) I have not checked that figure with that statement, because you would have to take into con-
1965 sideration all of the costs of production of the mines in question, which are not available to me and never have been. That is a compilation of costs of a number of different mines, and what is true of the 73 mines might fluctuate very considerably with any one set of figures you could take. This statement shows a number of items that are not affected by idle time, a lot of items that are affected by idle time, and items eliminated by idle time. Miners' wages, for instance, are eliminated. Using the illustration of a reduction from six days a week to five days a week, with increased cost of 20 per cent, from my personal experience as an accounting officer of the coal company I would say this is a very reasonable showing. I cannot take this statement and state any item that might be fairly typical. I cannot state the costs of production for a mine without having the figures for that mine.

By Mr. CURRY (1050):

These studies were made during the time when the coal operators were required to report monthly costs to the Federal Trade Commission during war times, and those reports were turned over by the Federal Trade Commission to the engineers' committee of the United States Fuel Administration, to Dr. Garfield's advisers, along the line of costs and prices. The time is not taken from the records that were submitted to the railroads showing the hours worked. I assume that the time here was taken from the report on lost time which appeared upon the cost sheets themselves. There was such a provision upon those sheets.

Redirect examination by Mr. BALLARD:

As to the significance of the words "830 observations thus obtained" on Exhibit 39 (p. 1051), I think that probably has reference to the 73 operations multiplied probably by the number of months. There were ten or eleven months in that period.

1966 GEORGE S. BRACKETT, called as a witness, and being first duly sworn, testified as follows:

Direct examination by Mr. BALLARD: (1051)

I am now secretary of the Northern West Virginia Coal Operators' Association, with headquarters at Fairmount, and have held the position for close to two years. Prior to that time I was with the Pitts Vein Coal Company for about seven years. That was a coal-mining company which for the last three years, 1918, 1919, and 1920, had three mines, and prior to that time, one. (1052) I went with the Pitts Vein Coal Company in 1911 as their superintendent and was appointed general manager in 1916. Prior to 1911 I was superintendent for the Maryland Coal Company in the same locality. Prior to that I did some independent engineering practice; was located with the Maryland Coal Company in their mines in the George's Creek for a while. I have had experience as a mining engineer since 1897. I have had a technical education at Columbia University, as engineer of mines, School of Mines. I have prepared for purposes of illustration a simple sketch of the three kinds of openings of bituminous-coal mines.

(This drawing was offered and received in evidence as Exhibit No. 41.) (1053)

These three methods of openings depend primarily on the location of the coal vein. If the coal vein is on a hillside above the level of the valley, it is usually opened with a drift. If the coal vein is of shallow depth under the valley, it is reached by primarily a sloping rock heading known as the slope. If the coal vein does not crop and lies deep under the valley, it is reached by a vertical shaft. The upper sketch shows the run-of-mine tipple. (1054) The second screens in the two grades, and the third screens in the three
1967 grades of coal. Either one of those might be employed in connection with either kind of opening. There is no necessary connection between the kind of opening and the method of getting out coal after you have gotten under ground. (1056) It is my opinion that the most usual method of getting out the coal after you have gotten under ground is the room and pillar system. I have made two sketches, one a general one and the other a more detailed one, for the purpose of illustrating the room and pillar method of mining.

(These sketches were offered and received in evidence as Exhibits Nos. 42 and 43.)

(1056) As to what goes on in a mine using the room and pillar method, the first is the driving of your main headings, noted here as main butt headings and main face headings. Then in between

those (1057) in the center of the map, 3, 4, and 5 are what are known as butt entries or commonly called room headings, and off from these are driven the rooms. After those rooms have been driven up to their extremity, 45 illustrates the method by which the pillars that lie between the rooms are extracted. Pillar is a technical term for what would be ordinarily known as a partition. In extracting pillars, the first operation is to drive what is known as a crosscut through a pillar at varying distances from the end of the pillar. A crosscut is simply a place driven through the pillar between the rooms. That leaves a stump between those crosscuts and what would be the top, and the miner begins attacking that stump from the crosscut side, which leaves him an access to a region of safety, and he keeps mining from the center of that—this is one method—leaving two long stumps on each side, as shown in the second pillar from left, and gradually those stumps are robbed from the upper until all of the coal is extracted in that section, and the roof falls. (1058) For the purpose of discussing the problem of assigned cars, the room and pillar method of operation may be taken as typical. I presume over 75 per cent of the bituminous coal mining in the United States is done in this way. I was
1968 mine manager of the Pitts Vein Coal Company until October 1, 1920. The mines I operated for that company were Pitts vein Nos. 1, 3, and 4, which were located on the B. & O. R. R. in their Monongahela division between Clarksburg and Grafton, in the Fairmont field. (1059) They were drift mines and had the room and pillar method of extracting the coal. During my operation of these mines they received assigned cars, and also received commercial cars from time to time during some weeks. The period during which assigned cars were given varied in my connection with the company. We had at one time a contract covering a period of time for the entire output, a year in several cases. At other times we had assigned cars for single days at a time, and then on the next day we would produce commercial coal. (1060) During this period mines in our immediate neighborhood received assigned cars. The mines that I have in mind usually work on full-time output contracts. As to some of them there was the Rosemont Coal Company Rosemont mine. That was the only one that, I think, had consistently a railroad-fuel contract. I think the other mines received assigned cars on and off as our mine sometimes did. As to the relative effect on the running time of our mines in working on commercial cars and working on assigned cars, we always had a full car supply when we worked on assigned cars, and commonly a broken car supply on commercial cars. Occasionally our commercial car supply would drop down to only 10 per cent. I have gone
1969 through periods on the commercial basis when we would not get one day's work a week. (1061) I am speaking of prior to 1920.

By Mr. FLETCHER:

Between the years 1916 and 1920—this applies to 1918, possibly. I could not put my finger right on the period.

By Mr. BALLARD:

This refers to the period of ten per cent supply. In 1920 I had some assigned cars, practically all through the year. I think I had one mine on a year's contract and one other mine I took assigned cars for a day at a time. (1062) On the days we had assigned cars we, of course, had a full run of cars, all we could load. The other days we had simply our pro rata share. As to the effect on our labor supply, our men naturally would leave us if we could not give them a reasonable amount of work. During times when we were shut down to a day or two a week we always lost men. It had a bad effect on our labor, of course. It reduced our force, made it impossible for us to load what we should load at times when the car supply improved. The men that we kept worked what little work we had to give them. The best men usually left. Those who remained were not satisfied with the amount of work they were (1063) getting during those periods. During that time we got assigned cars on two bases. One was to keep our production up, and to keep our men in as much working time as we could. During that year the Baltimore & Ohio Railroad Company did not contract for all of its coal, and they were buying coal on the open market. During days when there were very few commercial cars available they would ask us the night before if we could load or would load assigned cars for B. & O. fuel the next day. It was asked by the fuel agent or a representative of the fuel agent, who 1970 had a desk in the car distributor's office. I said to him either "yes" or "no," being influenced by whether or not there was any chance of getting commercial cars. (1064) If the chance was bad, we probably said "yes." When we did receive assigned cars in that manner, it gave our men a day or two of work that they would not have had otherwise. It acted to our benefit in that way. As to irregular running time, the advancement of the headings is the biggest effect it has on a new mine. Assuming that it is a new mine to be started, at the entrance of the mine shown in the upper right-hand corner of Exhibit 42, when the openings are made, you can only work four men in those four main headings; that is, at the very start of the work. And those men work until they cut back to the main face headings, breaking off to the left when those headings are reached. Three more men can be placed. According to this map there are six working places breaking off to the right which were probably put there for the purpose of accommodating six more men as those headings advanced. After you pass the main face headings (1065) breaking to the left, those headings must be driven until you reach the first butt entry, shown as No. 1, before any more men can be placed. The heading must be advanced before any rooms can be opened. As soon as you start advancing that first butt entry you have two more working places. Then you begin

to drive your rooms, and each room furnishes ordinarily one working place. The capacity of that mine cannot be reached until there are considerable rooms developed and occupied by men, and the time that it takes to advance those headings is dependent on the working time of the mine. During a good car supply the development up to what you want to make the capacity of the mine can be done quicker than it can under broken car supply. The developed mine rule in the proposed rules, gives the mine
1971 as long as it is in the development period, a full run. (1066) That rule lasts long enough to develop a mine up to a big capacity. You cannot do it in six months; in fact, there is a limit on the production in that rule. The effect that the car supply has on drawing the stumps is principally in the last few mine cars of coal that must be taken out of these small stumps. They must be taken out at the time the roof begins to crush or the stump will be lost. The car supply makes it difficult to extract those last stumps at the time they should be extracted, in order that the roof can be broken as it should be broken with each block of coal that is taken off the end of the pillar. The stump must be taken out within a few hours after it is ready to come out. If it is not ready to come out it causes you trouble in the pillaring. (1067) The trouble is brought about by the small stump of coal stopping the fall of the roof, which throws an excess amount of weight on to the next block of coal that has to be taken out on the same pillar. The coal in the first stump is lost forever. In addition to the loss of that particular coal, it prevents an even break along that pillar line and adds more weight to pillars and spreads your trouble from that one locality on to the adjacent pillar workings. When a stump is in that shape, the mine foreman, where he has to save mine cars if he is sure there is not going to be railroad cars available, must in some cases put on a night shift in order to take out that stump and load it in the mine cars. A long shut-down will cause trouble with a larger block of coal. A block of coal that would not give trouble for one day might give trouble in a week's time. (1068) I would not say that he would be invariably able to stop it or to eliminate the trouble by the expedients that I have described, but he would have a better
1972 chance of eliminating the trouble with one day's idleness that he would with a week's idleness. But it has the same practical effect, even in that case.

By Mr. Brows:

Our mines were union at that time. Under the union rules the men would go in and work without a car supply in that district.

By Mr. Ballard:

Your production cost is always higher during short car supply than it would be during full car supply or a full production. It is for the reasons explained by Mr. Reed. (1069) I have figures showing costs for a large number of mines during short car supply and full car supply periods.

By Commissioner ATTCHISON:

As to over-development of the bituminous coal industry, there is no question that in 1921 there were more mines or a bigger capacity than the market would absorb at that time. To go back to 1918, I am inclined to think that there was no over-development. Generally speaking, I believe that that is right, that there is a reserve capacity in the industry as a whole. A certain amount of the trouble I am talking about would be caused equally by a shut-down due to lack of market or a shut-down due to the fact the industry could not possibly expect to have a market. Every shut-down causes trouble in the pillars. (1070) Of course, I am not familiar with all the districts. I am inclined to think that the actual man power of the mines is not as much in excess of the demands as some people seem to think. As to whether the mines with which I am familiar could have found a market if they had had a full car supply day in and day out over the period with which I am familiar, we operated
1973 pretty regularly during the year 1919, when there was a slack demand. We produced an ordinary year's production during that year. I was not operating in 1921, but I do not think there would be market enough to absorb the output of all the mines during that year. I doubt if there is a year in which the market would have absorbed the output if they had been given a full car supply day in and day out throughout the working year. That being the case, it would have some effect as to certain of our troubles, of course, except that the operator would have a chance to operate his mine when the mine conditions demanded it, which is out of his hands during periods of car shortage. Probably he would not shut down for long periods. He would probably shut down a day occasionally. That would mean a considerable fluctuation in the number of cars supplied to him at his will.

By Mr. BALLARD (1072):

It may be necessary sometimes to shut down a mine for technical reasons irrespective of the market, but that would be an emergency, such as a shut-down to repair some essential part of that mine that cannot be repaired while the mine was working. Ordinarily the idle time which is not due to car supply is due to no market; that is the big factor. If the mine could not ship its coal, it would not want cars. I prepared an exhibit showing the comparative advancement of headings of a mine during two periods, one of short car supply and one of full car supply. I got the data from the company who operated the mine.

(This statement was offered and received in evidence as Exhibit No. 44.)

(1073) Those figures were taken from the same mine, and there was no other factor in the situation to account for this differ-
1974 ence than the full running time and the short running time.

In my opinion it was, in fact, due to that. I have prepared an exhibit showing the effect on cost of full time and short time in the case of a group of mines.

(This statement was offered and received in evidence as Exhibit No. 45.)

This exhibit is from figures that were filed at the association offices in Fairmont, showing the cost of production and the tonnage shipped for different periods. It covers thirteen companies, as indicated. There was a full car supply during the period 1921, as compared with a broken car supply during the year 1920. There were three periods of 1920 separated on account of wage changes which went into effect in August, 1920. The short car supply period from September to December, 1920, is directly comparable with the free car supply period. Identical wages were in effect during the year 1921.

(As to the item April to December, 1920), in order to cover a larger tonnage and a larger period, a correction was made in the costs as reported for the period April to August, inclusive, so as to increase the cost in those few months to what it would have been had the $1.50 per day increase been in effect from April, to the best of (1075) my knowledge. So the figure of $3.28 is adjusted so as to be directly comparable with the $3.01. The exhibit says thirteen companies. There were more mines than that. I do not remember just what companies there were. If there was a pro rata distribution of all cars in accordance with mine rating, it would help the situation from a mine standpoint to give all companies an equal opportunity to meet their difficulties. My office sold coal during this period from 1916 to 1920. As to the effect on that branch of the business from irregular car supply, we had trouble meeting the wishes of our customers. We always tried to give them what they wanted when
1075 they wanted it. (1076) We could not always do that. My duties as secretary of the Northern West Virginia Association are the normal duties of a secretary of a producers' association. We collect information that we consider to the interest of the industry, including information with respect to car supply. I am familiar with the car-supply figures that represent the current situation in our field. The number of assigned cars in the Fairmont district has been increasing steadily since the first of October. The car shortage developed about the 23rd of August, 1922. (1077) As to whether assigned cars could be used in October, 1922, the Baltimore & Ohio Railroad would, I believe, use such cars for their fuel, but the foreign railroad fuel cars do not come in to any extent until about the first of October. The Baltimore & Ohio is the principal carrier in that region. I have figures showing the percentage of cars loaded to rating separated between assigned and commercial mines for October, 1922. That was the month during which not only Baltimore & Ohio Railroad fuel cars were assigned but foreign fuel cars.

(This statement was offered and received in evidence as Exhibit No. 46.)

This information comes from the car distributors of the railroad. They give us the cars available and the cars loaded and the

ratings of the mines. (1078) This exhibit shows that in the first week in October the assigned cars averaged 219 a day and the commercial cars 384. The second week the assigned cars averaged 241 per day and the commercials 364. During the third week the assigned cars increased to 314 and the commercials down to 338. The fourth period shows for eight days, from October 23 to 31, the assigned cars averaged 407 per day and the commercials 396.

By Mr. BROWN:

1976 (1080) We had assigned cars during the first half of the month in which the commercial cars vastly exceeded the assigned cars. My belief is that the Baltimore & Ohio was getting its fuel all that time, but the foreign assigned cars had not yet commenced to come into that region. That accounts for it.

By Mr. BALLARD:

The figures I have gotten since the exhibit was made up cover the first eleven days of November—that is, ten working days—the total rating for which period is 20,547; the total cars loaded, 7,981; the per cent of cars loaded to the rating, 38.8. The assigned cars numbered 4,372 and the commercial cars 3,609. That is an average of 437 assigned cars per day as compared (1081) with 361 commercial cars per day.

(1082) Nov. 20, 1922.

Cross-examination by Mr. CURRY:

(1087) There are approximately 250 mines on the Monongah division of the Baltimore & Ohio. I can only estimate the number of those which ship coal in assigned cars at between 40 and 50. I could not give the exact number that ship to the Baltimore & Ohio. I would not believe that there are quite as many as 18. (1088) Referring to my Exhibit 46, the assigned cars include private cars and the private cars, in my opinion, do not exceed over forty a day on this division. The assigned cars shown in this tabulation did not include cars assigned under the commission's orders for Lake shipment. I do not think there are any of those during this period—that is, free priority cars. (1090) Concerning the assignment of cars by a railroad to its stock piles to move coal, with relation to any discrimination that would exist between unequal work-

1977 ing time of the mines, there would be none, if all the cars were distributed equally and the railroad consigned cars just to its stock piles. That would eliminate all the disadvantages of an unequal service to the mines, from a mine standpoint. My testimony was that the unequal working time of the mines was unfair and gave some mines an advantage over others. I am assuming that when they assign cars to the stock pile they are giving the mines themselves an equal working time as among themselves. There are no mines under that system that would have any advantage by reason of a full car supply. What I say applies to a company owned mine as well as a privately owned mine.

(1091) By Mr. FLETCHER:

If cars are assigned by a railroad company to a mine operated exclusively for the production of railroad fuel, the mine, whichever it is and whoever owns it, has an advantage in selecting its labor and in efficiently operating its mine that the other mines do not have. Supposing it did have an advantage and was not in competition with you, it would have a bad effect on the peace of mind of your employees. Men who mine the coal, it seems to me, are entitled to an equal "shake." I do not see that it would have any effect upon the competitive aspect of the question.

By Examiner BARTEL:

(1092) All railroad mines that I know anything about are operated practically continuously when they are being operated. Assuming that they have a labor supply continuously, one effect is the dissatisfaction that the miners of the neighborhood have when they get, we will assume, a day's or two or three days' work a week and the other miners get six. If a man were working three days a week and was dissatisfied and could not go to the railroad mines because they would be filled up, it would simply contribute to his dissatisfaction.

1978 By Mr. FLETCHER:

My experience has been that a satisfactory operation of a mine depends on the good will of your employees. If they are dissatisfied and are not making a good, fair living, they do not give the results that they would under the other conditions.

By Mr. ROTHRUCK:

(1093) I think that the general demand for increase of wages by miners and the dissatisfaction and unrest are more pronounced in the case of the mines which are working short time. And if these commercial mines are reduced as contrasted with the railroad mines, the unrest among the miners will be increased thereby.

By Mr. CURRY:

As to whether I regard the hardship of the assigned car rule as being lessened if the mines furnishing coal to the railroads are required to furnish the entire output, the (1094) effect on the employee is a matter of degree, and if one mine works full time upon the entire output and another mine part of a week, the dissatisfaction is exaggerated and more intense than it would be if one mine worked full time and the other four or five days a week. If on one day the mine will ship coal only commercially and the next day it will get assigned cars in excess of its pro rata share, and the next will ship commercially, and so on, the result of that would be that the mine which was working full time would be working four or five days a week, and the commercial mine would work, we will say (1095), two or three days a week. The difference is not as great as where one mine works one day and the others five or six days. It is a matter of degree.

By Mr. FLETCHER:

From the standpoint of the morale of the employee, I would say that it is better to have a rule which will permit
1979 the railroads to work one day on assigned cars and then go back to the other basis. (1096)

By Mr. CURRY:

As to whether it is feasible for railroads to secure their coal in the absence of an assigned car rule, I am not a rilroad purchasing agent; but, from an outside viewpoint, lots of other industries do get their coal. It is right hard for a man who is not connected with that part of it to realize why they have to have assigned cars while the other industries do not.

By Examiner BARTEL:

I have complained to the commission a good deal about the assigned cars down on the Baltimore & Ohio. As to curing this, it is hard for me to see, not having qualified as a purchasing agent, why they cannot get their fuel the same as other people get theirs.

By Mr. CURRY:

The Baltimore & Ohio use prepared sizes of coal from down there. (1097) I would estimate that 125 of the 250 mines could produce it [this prepared coal]. I am not familiar with the so-called preferential contracts for the purchase of coal. I do not see why the railroads cannot purchase coal the same as everybody else does. The other people buy a certain quantity of coal, and during certain seasons they may not take it. We have frequently sold coal in that way, and in periods of car shortage they as for it all. The steel mills and the other industries that do not have private cars get their coal. That is true in my district. Cement mills get their coal in the same way without the use of assigned cars. We have very few public utilities in our region, and I do not know what public utilities purchased coal in our district. (1098) There have not, to my direct knowledge, been any other instances since 1920 where the car distributor's office called up and asked if I could sell coal to the railroad and promise cars if I could do so. In 1921 there was none,
1980 of course. There was a free car supply. (1099) The only time that could have been would have been within the last few months, and not to my knowledge have they bought coal in that way from day to day. I do not, of my own knowledge, know of any railroads which are able to secure their fuel without the use of assigned cars. Turning to Exhibit 46, it is my understanding that some of the other districts had a considerably better commercial percentage than we had. If they equalized the percentage of commercial cars between districts, there would have been considerably more, necessarily, than the number of commercial cars that was given here. The assigned cars, of course, are not counted in the distribution between regions, and that distribution between regions (1100) should be and is on a commercial basis; and, to bring this region

up to the same percentage of commercial cars that the other regions enjoyed, there would necessarily have had to be more commercial cars than shown on here. Equalization of the percentage between districts would, of course, diminish the bad effects. The more closely commercial-car distribution approaches the 100 per cent the less the difficulties are. I haven't figures showing how the commercial percentage in this district compares with the percentage in the other districts on the Baltimore & Ohio.

By Mr. FLETCHER:

(1101) The inequalities in mine working time produce or contribute to the dissatisfaction. That is one of the big troubles so far as labor is concerned. My belief is that some kind of rule should be made by this commission so that all mines would work the same amount of time. In times such as 1921 the commercial mines did not all work the same amount of time throughout the country.

There were a great many mines which did not work at all.
1981 There were mines which did not work on account of lack of orders. There is only one way, in my opinion, to remedy the situation—by competitive conditions. I know that, as a competitive operator, I would always like an opportunity to compete and get my share of the business if I could. (1102) I would not be in favor of some kind of rule made by the commission which would give mines a full supply in times of short car supply and oversupply as well. But such a rule would give the operator a chance to exercise his own ability to take care of his own men and control his own market. As to their being more inequality in times of car plenty than there is in times of car shortage, in 1921, for instance, there was a greater curtailment of production due to lack of business than there was in 1920 due to lack of car supply. I think that is right. I do not think there is any question about that.

Q. (By Mr. BROWN.) It is not a question alone of car supply! Is there not always the question of motive power and terminals involved in case of car shortage?

A. I would say "yes," not being a railroad man. That would be my opinion—that it is one or the other.

Q. Of course, now we do have accentuated the question of car shortage; (1103) but it is not always true in case of short car supply that there is also a question of motive power, as well as terminals?

A. I would say "yes," but I am not a railroad man.

Redirect examination by Mr. BALLARD:

I do not advocate anything except equality so far as the transportation plant is concerned. I do not want any commercial inequalities equalized by the commission. On the Monongah division of the B. & O. between four and five hundred cars of railroad fuel
1982 are produced per day. Assuming that those mines were loading their rating, the total rating for the division of all coal would be 2,054. (P. 1104) A railroad's passing an occasional day

around to the different mines distributes the fuel over a greater number of mines and makes less inequalities in the working time. The effect on cost is a matter of degree. A mine that works part time has a higher cost than a mine which works full time. The mine which has the occasional day has a cheaper cost of production than the mine which is on a straight commercial basis during periods of car shortage. (1105) As to unit costs, the assigned car hurts the operator less under the spot system of assigning cars than the output system. As to the effect on his sales department and the development of his good will, the occasional day hurts him the most in that instance, because he is competing with that mine. The Baltimore & Ohio have had a few stock piles right at the mines. I do not think they have had any at the points of consumption. I do not know of the location of any B. & O. stock piles outside of my district.

H. L. TUCKER, called as a witness and having been first duly sworn, testified as follows:

Direct examination by Mr. BALLARD:

I reside at Central City, in western Kentucky, and am president and general manager of the Rockport Coal Company, in which I own a controlling interest. As president I have the entire direction and supervision of all operations, including the commercial end of the business. (1107) The company owns Rockport mine No. 1, located at Rockport, on the Illinois Central, and Rockport No. 2, located at Centertown, Kentucky, on the Louisville & Nashville. Our mines have received assigned cars for railroad fuel only a day at a time. That kind of business has just been occasional. I developed the mine at Rockport 14 years ago and the one at Centertown
1983 about two and a half years ago. We have never received any assigned cars from the L. & N. whatever. (1108) We are not receiving any now at our No. 1 mine. There has been a time when I have not received assigned cars while other mines in the neighborhood were receiving them. The Martwick mine of the Greenville Coal Company, one and a half miles away, on the Illinois Central, is one. This is the same railroad that serves our No. 1 mine. Another mine receiving assigned cars is the Nelson Creek Coal Company, three miles away, on the Illinois Central. Another is the Louisville Gas & Electric Company mine at Echols, Kentucky. I believe that is better known as the Kentucky Coal & Coke Company. (1109) That is one mile away. As to the effect the assignments of cars to those mines has had on the running time of our mines, in periods of short car supply those mines operated every day, while some weeks I did not operate at all, some weeks only one day, and some weeks two days. Such a situation has continued during the entire period of car shortage, sometimes four or five months. It happened in 1920, and is has also happened in 1922, the past two or three months more particularly. That amount of running time of our mines has the effect of increasing the cost of production per ton materially. The first reason is the short running time on account

of not receiving as many cars as they do. (1110) I have to keep my mine in condition to operate on the day that I do receive cars, and thereby it is adding to the general expense of operation. Also, there is an added cost due to the fact that you lose to the mines that are operating every day some of the best skilled labor that you have around the mines. I have prepared a comparative statement of our costs in June and September of this year. These figures were compiled under my supervision by our bookkeeper.

(This statement was offered and received in evidence as Exhibit No. 47.)

1984 (1111) In the month of June the cost of production was $2.31, working 168 hours in the month and producing 14,289 tons. In the month of September the cost was $3.68 per ton, working 42½ hours and producing 5,747 tons. There was no difference in wage scales during these two months and no item that I recall of unit cost which ought to be adjusted so as to make these directly comparable. There might be a discrepancy there on some particular article that might have been used in one month and not in another. That would fluctuate it a cent or two a ton, but it would be very little. (1112) Under conditions when we were running a few days a week or none at all and neighboring mines were receiving a supply of cars and running full time, I found that my neighboring mines would come into the locality where my miners live and state to them that they had contracts for the output of their mine and would be running every day, thereby inducing the most important and best skilled labor that I had to leave and go to their mines. Naming this skilled labor, they would be machine runners and track-layers—two of the most essential kinds of labor to the production of coal. The "machine runners" operate the machines which cut the coal. That is skilled work. The labor which I was able to retain myself was in most instances inexperienced and not the most desirable, and their efficiency possibly 50 to 60 per cent that of the men I lost. Such experience, when continued over a substantial period, has a permanent effect on our business. (1113) For illustration, I will say that if my mine was rated at 750 tons per day and this condition continued, it would possibly, on account of loss of labor, force me down to a rating of 450 or 500 tons per day. As to other respects in which labor would be affected, the labor is more or less dissatisfied, and I think that that, in this particular day, causes labor to demand a higher wage in times of

1985 making contracts than they would demand if they had an equal part of the work in the field in which they might be located. As to the effect on the commercial and sales branch of our business, it places the sales end of the business in a very embarrassing position, due to the fact that you sell coal with the expectation of delivering it; and, for illustration, we will say that the car supply is three days per week at the time you make the sale, and before you can get this coal delivered it has dropped off to one

day per week and thereby increased your cost to the extent that on the day that you ship the coal you are getting less than cost of production for it. (1114) In that illustration the reason for the dropping off of running time is the continued car shortage and output mines getting all the cars available for distribution.

By Examiner BARTEL:

When I prepared this exhibit I wanted to get one of my own mines which was running as near full time as possible. June was the nearest I had. Then I wanted to get a month for my own mines—the same one—which had fifty per cent, and September was the nearest I had to that. In the month of September I am contending that my neighboring mines had assigned cars. (1115) This was on the Illinois Central. Now, one of these mines is the Kentucky Coal & Coke Company mine, which had a more serious effect on me at this particular time than any other mine. They have assigned cars on the Illinois Central. That railroad did not get their cars under Service Order No. 23. The Kentucky Coal & Coke Company has privately owned cars. I found them using them for every-
1986 thing, with the assistance of the Illinois Central Railroad. The exhibit was not for the purpose of complaining that some of our neighbors had a full running time. (1116) I am not stating that September was the particular month. I compiled this statement to show the difference between a partial running time and a good running time. But during this period that I had this partial running time I am contending that our neighbors had full running time.

By Mr. BROWN:

I took those two months [on the exhibit] to show the increase of our operating costs from a full to a partial supply, without reference to what our neighbor got.

By Mr. FLETCHER:

I had priority orders, to my sorrow.

By Examiner BARTEL:

If in September we had priority orders, our mines should (1117) have been working the same time as other mines.

By Mr. FLETCHER:

Sometimes I got cars for our orders and sometimes I did not.

By Mr. BALLARD (1118):

I have operated on the commercial percentage car distribution when neighboring mines were receiving assigned cars on some days in excess of their pro rata share and shipping commercial coal on other days, one of the mines shipping railroad coal under contract with the railroad and the others, with privately owned cars, in some instances selling to the railroad and at other times selling their coal commercially. That is to say, mines that were receiving as-

signed cars of both those classes sometimes shipped in assigned cars and sometimes sold commercially. In that situation the effect on our business is different from the cases where neighboring mines are receiving full running time the whole time on their output
1987 contracts. In my commercial business there is a material difference. The difference is, in the selling of my coal, that the mine that (1119) is receiving full running time for railroad fuel coal does not enter into competition with me in the commercial business, that is, in the selling of the coal. But the mine that is receiving one or two days per week on an output basis, the cars not being counted against their commercial rating, and in the remainder of the week receiving an equal distribution of cars available for commercial coal is in a position where they can produce cheaper coal, and in fact go into the market and sell their coal at my cost, and at the same time not [sic] have a reasonable margin of profit. So far as the difference in labor is concerned between the situation I am now speaking of and the situation I testified about earlier, it is the same in both instances. (1120) I have known it to be the case in my district that mines receiving assigned cars had more empties left over at the end of the day than those receiving commercial cars. I have prepared some figures with respect to two particular mines on that point—the Kentucky Coal & Coke mine at Echols, Ky., and Rockport No. 1 at Rockport, Ky.

(The statement containing these figures was offered and received in evidence as Exhibit No. 48.)

Referring to this exhibit, the percentage of distribution which we received during this month at our Rockport mine No. 1 was 46 per cent and the percentage of distribution of the Kentucky Coal & Coke Company's mine at Echols was 80 per cent. In the first three and a half weeks at Rockport mine there were only on four different occasions any part loads (1121) or empties left over down to July 25th. I had been continuously calling the superintendent's attention to the distribution of cars at my mine, and he immediately then began to put the cars into the mine every day, and in greater quantities than my rating showed, and also in greater quantities than I ordered for loading. My reason for not ordering a full supply
1988 of cars at that time was that I had lost so many men and my tonnage had fallen off to such an extent that I could not load it, and therefore I only ordered a portion of my rating. The first column after the day of the month shows the cars which we ordered. The second column after the day of the month shows the cars furnished by the railroad. In the upper left-hand corner you will find my rating to be 14 cars per day. From that date on the cars furnished ran above the rating. Those cars did not do us any good as late in the month as that. (1122) That condition in the month of July and the shortage of cars that I received in that month, according to figures compiled in my office, lost me $10,000.

By Examiner BARTEL:

My rating prior to July 10 was 14 cars. There were some days when I could load the cars, and I did order more cars than our rating. If I thought I could load 15, I ordered 15.

By Mr. BALLARD:

The Echols mine, in regard to left-overs, beginning with the first day of July, on a rating of 17 cars per day, was in this situation, that there wasn't a day during the month that they operated that they did not have from 1 to 13 cars left over.

By Examiner BARTEL (1123):

Those cars were all kinds of cars, private coal cars, foreign cars, and Illinois Central cars, and all kinds of equipment.

By Mr. BALLARD:

The situation depicted by our Exhibit 48 has occurred continuously at the Echols mine since their purchase of that mine, with exceptions of the last couple of months. It happens with respect to other mines than the Echols mine, where they receive cars on the same basis that the Echols mine receives them, a part output basis—private owned cars—and at other times a commercial mine * * *.

The difficulties I have testified to in regard to labor and cost
1989 and the commercial end of our business and such others as I referred to would be eliminated or reduced by the equal distribution of all cars to the mines in the district. It would be of great importance to me. It would place me on an equal footing with all my competitors in the marketing of my coal. (P. 1124) If there was a rule and I had to decide between the assignment of cars on certain days and the assignment of cars for the entire output for a long period—first let me say that I would prefer there would be no such rule—I would prefer that they be compelled to take the coal for at least a year, because that would not interfere with my market conditions, would not give my competitor any advantage in the cost of production, and ruin me in the market. In my estimation the assigned-car practice is one of the greatest evils that now exists in the coal industry. It brings about more hardships than any other one thing that happens to the coal industry.

Cross-examination by Mr. FLETCHER (1125):

They are not taking the entire output of Mortwick mine, and it is not on the assigned car basis at the present time. During the time it was on the assigned car basis they took the entire output. I think they have taken it for from one day to a week, thirty days, and for six months to a year. I think in 1920 they took from most any mine in the Louisville division and its output, and did not count the cars against it. The period was for one day in a week or two days in a week during extreme car shortages when they needed coal. (1126) I think those times of extreme car shortage started, possibly, in May, June, July, and part of August. I will not at-

tempt to testify that during the entire months of May, June, July, and August it was the practice of the Illinois Central to take the output of the Mortwick mines and the other mines in the territory one day at a time during those four months, because I have
1990 not the figures, but I will testify that they did with the Rockport mine—my mine—because I have the figures. I said a day at a time in a week, or two days at a time, and maybe then it would not occur for two weeks or three weeks; but when they needed coal they would say that "if you will give us the day's run we will furnish you with cars and they will not be counted against your commercial rating." (1127) I have not the figures before me as to how many days in that four months the Illinois Central took the output of the Rockport mine. I have them in my office. I will be glad to file them in this record. As to the mines I testified to as receiving assigned cars from the Illinois Central, none now except the Nelson Creek Coal Company are receiving assigned cars in full. In this connection, up until possibly two months and a half ago, this practice was being put into effect at the Echols mine, but pressure was brought to bear on the management of the Louisville division. The superintendent of the Louisville division of the Illinois Central Railroad stopped that practice, that is, the practice of allowing them full running time, due to the fact that they owned some 25 of their own cars. I think that stopped it, and it has not been put into effect since, unless since I left home. (1128) My understanding is that the Illinois Central took the output of the Nelson Creek Coal Company for one year. The Pacific Coal Company had an instance in 1922 of receiving assigned cars from the Illinois Central where the output had not been taken for at least six months. It gave to the Illinois Central Railroad, to my knowledge, one weeks' output. I would not attempt to qualify as to whether that was a time of extreme car shortage. I do not remember. That mine is located at Mercer, Kentucky, in Muhlenburg County. (1129) I do not assert that if the assigned car rule were abolished and the cars which are assigned to mines for company fuel were thrown into the general distribution that I would then have a full car supply. I have never figured out exactly how much that would increase my car supply. For the
1991 Louisville division of the Illinois Central, if you were to figure the percentage of commercial basis and not allow the output mines to enter into that distribution, it would increase my running time more than 5 per cent. (1130) Taking the present supply of cars, if you were to put them all into a pot and distribute them equally among company fuel mines and commercial mines—I have not my figures exactly on the increase of our car supply, but I would, in a rough way, say that it would increase it more than 5 per cent, and even though it was only 5 per cent I believe that would give me a day's running time more a week than I have been getting (1131), which would be of great importance to me. For illustration, suppose you had not had any running time at all, and you could get

5 per cent, it would give you some running time. That is not 5 per cent of nothing; it is 5 per cent of the commercial cars available for distribution, and there might have been a 90 per cent supply and I had not gotton any. If you would give me 5 per cent I would have a day. My statement for September shows 42½ hours running time. As to whether if there were an increase of 5 per cent in our car supply it would not give us a day a week, I do not want to be misled in the way of figuring percentage on this car supply. They do not figure it on the percentage of car supply, but on the percentage of commercial cars for distribution. The 168 hours when I had a full car supply does not have anything to do with it. (1132) If you present to me your car distribution sheet of the Illinois Central R. R. for June and September, I will explain to you my conclusion as to a 5 per cent increase in running time. I have not got it. I cannot give you the basis of my calculation in the way of figures. My calculation is not so wild. I think it is pretty close. (1133) I have not checked my statement containing cost figures with the estimate made by Mr. Reed as represented by his Exhibit No. 37. I do not know and cannot explain why it is that the items which he says are not affected by idle time are in my statement sometimes af-
1992 fected by idle time. (1135) As to the items showing that we spent $1,482 for timbering in September and $406 for timbering in June, we did more timbering in September than we did in June. That was not because our mine was not so active, but it happened to be a month when there was more timbering to be done, and we did it when it was needed. I do not think it was an accumulation of depreciation in timbering. We have occasions where we might have a fall of slate for a hundred or two hundred feet, and we did it at that time. That had no relation to the shortage of cars. The increased cost per ton, of course, would be affected by the shortage in the car supply. As to the total amounts spent for any particular class of labor, the car supply would have no effect on the amount. I attribute that the cost per ton is caused by a short (1136) car supply. I would not say that the short car supply was the cause of the expenditure of $1,482 in September as against $406 in June. As to an increase in dead work from $1,272 in June to $1,545 in September, I would say that the shortage of cars would cause an increase in the cost of dead work. You have got to take care of your drivers, and many times during those idle times you do work and work them when, if you had a good car supply, you would not. You have to do it in order to keep them. They leave you. They go to these fellows that have a full car supply. I would not attempt to agree with anything that Mr. Reed has put into his statement because I know nothing about it, about how it was compiled, and therefore would not attempt to agree with it.

By EXAMINER BARTEL:

(1137) Dead work takes in cleaning up gob, cleaning up slate falls, and the general muck work of a coal mine. It takes in a great many things that we put into dead work.

By Mr. FLETCHER:

As to the increased expenditure of $751.35 in June to $1,299.88 in September, in the way of power, I do not recall whether
1993 we got in new machinery and added power in that particular time or not. I can not answer without my detailed statement from my books as to whether that is largely due to the item of supplies in September of $1,044 as against an item of $489 in June. It is not a question of when I bought the supplies. It is a question of when they are used; and the thing in that particular is, as I have stated before, that while that shows more it might have been more had I been running every day, and had I been running every day the cost on account of that would not have been as heavy as it was when I ran on part time. As to why I consume more supplies in September with relatively small production than in June (1138) with a relatively large production, that happens frequently. You may be going along nicely, and all at once you have a motor or tender go to the bad on you, that in that particular month will add a material cost to your power supply. (1139) As to why the item of maintenance and repairs of $1,502.60 in June and $2,571.97 in September should be so large, sometimes these things will happen that during the time that you are working six days a week there is certain kinds of work that you can not do in maintenance and repair, and when this time does come along you do it, and that would make a little difference. If the idle time had not come we would have done it at night. It would have increased the cost just the same. I can not agree that total cost has no relation to the short car supply except that the short car supply enables you to get an opportunity to do that work. We could have done it at nights. Had I been receiving a good car supply the cost of my production would have been much less than it was on a short car supply. (1140) As to the large amount under the item of maintenance and repair in September, 1922, there have been several things in the last couple of months that happened in that mine that might indicate that, but without a detailed statement I would hesitate to state positively about it. However, I will be glad to furnish you the detailed
1994 statement from my records, if you want it, and also as to the item "Sundries." As to increase in officers' salaries and expenses from $463.27 to $776.19, we are not working on the proposition there that the less work we have to do the more we pay them. There have been since June quite a few added employees at the Rockwood Coal Company at different times that were not on the pay roll as officers, and thereby it increased it. (1141) I want to say now that the books of the Rockwood Coal Company are open for the inspection of the Interstate Commerce Commission as to the accuracy and correctness of the statement that I have presented here. I did increase the salaries of my mine foreman and my electrician and my superintendents and some of my clerks and some of my bookkeepers. (1143) Whether it was customary to sell coal at $3.68,

it was not. It sold for all we could get. The Echols mine is owned by the Louisville Gas & Electric Company. My understanding was that it had 25 private cars. (1144) That mine sells coal commercially; that is, to anybody that wants to buy it when it is for sale, not under contract with the railroads. That mine gets, in addition to the assigned cars, a certain part of the commercial coal cars on the same day.

By Mr. GUTHEIM (1145):

As to why the productivity of our mine per hour in June was 89 tons and in September was 135 tons, in order to keep our entrymen at work we have to show them some favoritism, and on those idle days we keep those men at work loading up all the mine cars in the mine. Of course, when we started to dump coal the next morning we dumped a higher rate per hour than we would under normal conditions. It would increase the productivity of the mine approximately 5 per cent per hour under those short running times. (1146) With the added activity to what the men would do working, it would do it very nicely. (1147) The general average capacity of the mine is thirty to thirty-five hundred.

1995 By Mr. FLETCHER:

The Greenville Coal Company and the officials of the Louisville Gas & Electric Company came to our miners and persuaded them to leave our mine and to go to their mine on the promise of continuous work. (1148) I cannot give you the names of the men that went to solicit our men. I think some of the men who went will say to you that the mine foremen and superintendents of those mines came and solicited them to go and work for those mines. I will say for the benefit of the Echols mine that their company took machine runners up to that mine to work in the past few months. I can not give you the names right now. I will furnish them to you.

By Mr. CURRY:

As to the hours worked as shown on my Exhibit No. 47, I have a daily report made out by my superintendent at each mine. That report is mailed to me at Central City and filed in my office and made a record there. (1149) These hours worked are compiled from those records and are the same hours reported to the railroad. Those are the hours that the tipple works. (1151) The Illinois Central at one time would try to take the entire output of our mine for a day and would offer to furnish us full car supply for that day if we would sell coal to it. Sometimes they said they would pay the regular railroad price, and at other times the price was a question. If the difference in the commercial price was not very much more than the railroad price, it was agreeable to accept the railroad price, and if the commercial price was excessively high, why, I always demanded a little more than their contract price. As to whether, so far as my experience is concerned, railroads use the assigned car rule to club down prices and use the full car supply as a consideration in securing

an unreasonably low price, I would have to answer that question yes. That is my observation of it. (1152) The way in which railroads could secure their coal during periods of car shortage in
1996 the absence of the assigned car rule would be to distribute the amount of coal needed amongst the operators whom they preferred to buy coal from in the different fields, and let them load it and let that enter into the entire rating of the mines and divide all the cars equally to the entire division or divisions. I think the operators would be willing to do that. They did it in western Kentucky for a number of years. I do not think there was any preferential contracts at that time. It was a matter of a man bidding on a portion of the railroad's business; and if the price suited the purchasing agent of the railroad, it was bought, and if it was not, possibly all the bids were rejected and the purchasing agent arrived at what he considered a fair price, and then offered that for the railroad fuel, and the operators accepted that price and furnished a maximum, we will say, of ten and a minimum of five. They got their coal under those conditions. (1153) That is the way the railroads avoided the necessity of over-purchases of coal, by having a maximum or a minimum. "It could either take the maximum or the minimum, and if none of them purchased under those conditions and there were to come a time when they did not need the coal would only take 50 per cent of the minimum; they would take what they required."
1997 (1153) Back in those days, when they bought the coal that way, I think the railroads had a greater incentive to store coal than they do now under the assigned car rule. By having the privilege of assigning all the cars that they may want for their railroad fuel it places them in the position where it is not necessary for them to store much coal, and I think the purchasing agents of the railroads overlook or neglect that particular. I think it was done more particularly this last spring, when confronted with a strike. I think it affects the general public and the general conditions of the country seriously by their not storing coal in times such as we had confronting us in the spring. As to the workmen I testified about, they were lost in every case to assigned car mines. They were taken away due to the fact that they could get steady work where the assigned cars were, and I could not furnish it to them at my place. (1154) We practically had to teach new men to do the kind of work that they were doing. I took some of those men and built them up to make efficient men. I figure that to make an efficient machine runner it would take a year. Not all the men that left our mine and went assigned car mines were green men. Some had had a little experience. I have replaced as high as three machine crews in the course of a month. That would be six men. The hostler is not so important as the machine runner. That was in 1920. (1155) At Echols they got two machine crews. That was, I think, in the latter part of the winter of 1921. I do not believe I could say that I have in this last couple of months lost any machine runners or scrapers to assigned car mines. I do not think I have, because

we have worked steadily along with the rest of them. I think the inadequacy in car supply on the I. C. in our field started in August.

In other words, our car shortage began to fall off on the Illi-
1998 nois Central after the settlement of the strike north of the Ohio River. I do not remember the date. I do not know how my division of the Illinois Central compared in commercial percentage with the other divisions of the Illinois Central.

By Mr. FLETCHER:

When we lost our skilled men to the Echols mine it was not during a period of full car supply. With regard to my statement as to the latter part of the winter, 1921, I do not think it was altogether always a full car supply. I might be mistaken as to the time. I would not confine myself definitely on it. I will furnish you the facts just when they quit and left. (1157) As to when the Illinois Central did not assign cars, but got their fuel by distributing their orders out among the operators, I think that ran anywhere from 1908 up to just before the war, or after the war came on. We were all getting, outside of the discrimination, about an equal distribution of cars. I mean that during that time they were discriminating and giving some mines more cars than they were entitled to. (1158) I do not know anything about the Traer rule.

Redirect examination by Mr. BALLARD:

I never heard of the Traer case under that name. I am not a lawyer. If the equal distribution of all cars on the Illinois Central would give me an increase of only five per cent in the number of cars available for loading, and, at the same time would put all mines on an equality, that would be beneficial to me. That would be true even if the increase to my mine was only one per cent. I believe in a square deal—equal distribution of cars to everybody. I based my testimony that the Echols mine on certain occasions had received assigned and commercial cars on the same day on facts, that they

have had some of their own cars assigned to them and loaded
1999 coal in and shipped out to their plants, and I bought commercial coal myself and sold it on the market. And on those days they have got more than their pro rata share of all cars. (1160) Lots of days they got cars divided up that way and I didn't get any.

By Examiner BARTEL:

They were private owned cars. They got their private cars assigned, and in addition to that got their pro rata share of commercial cars and even in excess of that.

By Mr. CURRY:

(1161) As to the hours shown on Exhibit 47 I did not report any other hours than tipple hours to the railroads. In my instructions—and I believe they are carried out—to the men who make these re-

ports, I direct them to report the hours each mine dumps coal, not taking out any hour or any time for anything at all from the time we start dumping until we quit.

2000 Cross-examination by Mr. FLETCHER:

(1163) As to my records I won't attempt to show that the Echols mine receives, as assigned to that mine, cars of the Louisville Gas and Electric Company and in addition to that their full pro rata of commercial cars, because I could not do that other than by going to the Louisville Gas and Electric Company's books to which I have no access. What I propose to show is that at times other than July they received cars which were not their own equipment, some of which belonged to the Illinois Central Railroad and others to other roads, and I did not receive a full car supply and [they] had cars left over and part of that coal was bound to be used for other than their own use. In October, 1920, due to the discrimination which existed between my mine and the Echols mine, I designated a man to check the tracks of the Echols mine beginning on October 20, checking the car initials and the car numbers. Reading from the records I have here on October 20 they received 7 Louisville Gas and Electric Company cars and 9 cars of other carriers, different roads. In all they received 16 cars that day, loaded 12, and had 4 left over.

By Examiner BARTEL:

The mine rating at that time I think was 17 cars.

By Mr. FLETCHER:

I do not know what became of those cars other than the cars of private ownership on that day. I have no way of knowing that except by going to the Louisville Coal and Coke Company's books, or by having access to the billing of that company at the
2001 station, which, of course, I am prohibited from having. I do not know whether that coal was sold to other companies or taken by the Illinois Central Railroad Company. On October [2]1st they received 15 cars, loaded 11, had left over 4.

By Examiner BARTEL:

(1165) I can distinguish between those cars and private cars. That day they had 4 cars of other carriers and 11 of their own cars. On the 22d they received 11, loaded 10, and had left over 1.

By Mr. BALLARD:

They received 9 of their own equipment that day and 2 Illinois Central cars. On the 23d they received 3 common carrier cars and 6 of their own cars, loading 9. On the 25th they received 8 common carrier cars and 9 of their own. They received 17, loaded 12, partly loaded 1, left over 4. On the 26th they received 17, loaded 13, left over 4; 10 of their own cars and 7 common carrier cars. On the 27th they received 17, loaded 10, part loads 1, left over 6. These were divided, 9 of their own cars and 8 of the other class of equip-

ment. On the 28th they received 18 cars, loaded 11, part loads 1, left over 6, common carrier cars 12; 6 of their own equipment. (1166) I want to compare that with the cars received on the same day by the Rockport Coal Company, my mine.

By Examiner BARTEL:

My rating at that time was 14 cars. On the 20th day of the month we ordered 12 cars, received 7, and loaded 7. Nothing left over. On the 21st we ordered 15, received nothing, and loaded nothing. On the 22d we ordered 15, received nothing, and loaded nothing. On the 23d we ordered 15, received 9, loaded 8, part loads, 1 left over. The 24th was Sunday. On the 25th we ordered 15,
2002 received 15, loaded 14, part loads 1. On the 26th we ordered 12, received 12, loaded 11, part loads 1. On the 27th we ordered 10, received nothing, and loaded nothing. On the 28th we ordered 14, received 11, and loaded 11. On the 29th we ordered 14, received nothing, and loaded nothing (1167). On the 30th we ordered 14, loaded 11, and had 3 part loads left over.

By Examiner BARTEL:

To make these figures coincide with the former ones, on the 29th the Louisville Gas and Electric Company received 13, loaded 8, had left over 5. Ten of those cars were cars of common carriers other than their own. On the 30th they received 13, loaded 10, part loads 1, left over 2. Six of those cars were foreign road cars, some Illinois Central's and the remainder Louisville Gas and Electric Company cars.

By Mr. FLETCHER:

I got this information from a man whom I hired to go to the Echols mine. (1168) I have his sworn statement taken before a notary public as to the accuracy and correctness of it. These records were taken and kept as long as my man was allowed to do it. He was forbidden to come onto the grounds and take the record and had to stop it.

Redirect examination by Mr. BALLARD:

As to my previous testimony that during part of the time when the Echols mine was receiving part of its own and part of other carriers' cars they sold coal to me commercially, I can not give the figures on what day or days they did that. I have at home in my office records showing the days I bought coal from them. I can not say positively whether I have their number of cars on that
2003 day and my number. I do not know whether he was checking their cars at that particular time or not.

CHARLES F. RICHARDSON (1172) called as a witness and having been first duly sworn testified as follows:

Direct examination by Mr. BALLARD:

I am president of the West Kentucky Coal Company in which my proprietary interest is nothing more than voting shares and owning

some bonds. I have been connected with it since 1911, having been assistant to the president and president of the company since 1916. I have had general supervision and charge of the company during all of the period of my connection with it. That supervision in a general way has included the underground work as well as the commercial end of the work. Prior to my connection with the company I was in the railroad service with the Rock Island, the Frisco, and the Baltimore and Ohio. (1173) Altogether I was about 30 years in the railroad service. For about 2½ years I was connected with the field department of the St. Louis and San Francisco as fuel agent. The mines of the West Kentucky Coal Company are located in western Kentucky in Union and Webster Counties. There are 9 mines. The Illinois Central serves them, and one mine is a joint mine with the Illinois Central and the Louisville and Nashville. We have received assigned cars for a period of one or two days at a time. (1174) We have had a long-term contract for railroad fuel, so that we have received assigned cars in both ways. During the times that we received assigned cars from day to day, usually the assigned cars would be for one day. In a few instances I remember having them for a two-day period and that was not
2004 at all of the mines. The number of mines which were affected by assigned cars which we got would vary. It might be one mine and it might be 3 or 4 out of the 9. There is a mine adjoining us owned by the Madison Coal Corporation which is supplied with assigned cars continuously. (1175) That is a railroad-owned mine. As to other mines in our neighborhood receiving assigned cars, the only answer I could give would be from information I have from the other operators. I never have seen the contracts. As to the Providence Coal and Mining Company, one of their representatives told me that last year they had an output contract, and there was also the Hunter Coal Company and the Ruckman Coal Company. Those were output arrangements. I know only in a general way as to whether mines in our vicinity have received cars from day to day mixed in with commercial cars on other days when we were receiving only commercial cars. I have heard the operators say that they had. The furnishing of assigned cars to other mines in the same district, either upon an output basis or from day to day (1176) during car shortage periods has a very detrimental effect because you do not get your equal distribution of the cars on the district, and it prevents the commercial mines from taking care of their orders, and in addition to that reduces your running time and increases your cost of production.

By Mr. FLETCHER:

Where a mine receives assigned cars during a short car supply, it takes away from the commercial mines a certain number of cars which they are entitled to and reduces their running time and increases their cost of production.

By Mr. BALLARD:

(1177) Where mines have assigned cars they are able to make a lower price on account of the lower cost of production
2005 due to continuous running time, and that lower price being made has an influence on the selling price received by the commercial mine on its production sold. Those prices never are kept in such a way but what they get out to the other buyers. For illustration, a railroad company making a very favorable price for the purchase of its coal and giving cars for an output contract. The commercial mine may sell a portion of its output to some other large steam consumer, possibly a railroad or otherwise. And that price that the railroad gets on their coal has an influence on the price you are able to obtain.

By Mr. FLETCHER:

It lowers it.

The situation I am now speaking of is where the railroad company is buying on an output contract. Where the railroad is buying on assigned cars from day to day and the mine it is buying from is selling commercial coal on other days (1178) that, generally speaking, does not effect the price we are able to get. The practice has been in our field that when the railroads took coal for a period of one or two days it was invoiced to them at the regular price but on the contract basis. That has not always been the case. As to the reduction in the running time of the commercial mine and the increase in unit cost, the comparative cost at one of our mines shows as follows: During the month when we produced 11,290 tons our cost per ton was 24% less than during the month when we produced 3,747 tons. During the latter month we were operating approximately 33% of full time, and during the former month we were operating full time. The cause of our short running time during
2006 the latter month was car shortage. Assigned cars were being given to other mines at that time. (1179) I do not mean to indicate that if the cars had all been equally distributed that we would have had 100% running time. We would have had a greater percentage of cars. This difference did not take into account the overhead expense; I mean general overhead like the president's salary, bond interest, etc. Short running time results in dissatisfied workmen and loss of men as fast as they can find opportunity to secure employment in mines where the running time is greater. As a result the mines with the assigned cars can secure the pick of the labor in their district. As to our own mine, we have frequently lost a great many of our best men (1180) because of their leaving us during the short running time period and going to mines which were working full time or nearly full time. That situation increases the labor turnover to the extent of the number of men you lose. When you lose skilled men like a machine runner or a good timber man, you do not always have men in your employ whom you can replace them

with. Frequently you employ several men before you find a man who will fill a particular place. If you promote one of your own men it takes some little time before he becomes efficient in the work. That, of course, means added expense to the cost of production. It is expensive to us to bring in a new man and break him in. The better class of men are the ones that we lose. In losing the better class men, of course, we probably notice that more than we do the loss of other men, but when we lose a first-class man, he is hard to replace. There is a permanent effect on the efficiency of our organization from the high labor turnover and the loss of our good men. If you have a long continued period of slow-running time and there are mines
2007 close by you that are running full time, your better class of labor will find employment there, and you do not get them back, and it takes considerable time to build your organization up again. During short running time we have a great deal of difficulty in getting our entries driven. The men prefer to work in the wide places where they can make more money, and it is rather difficult to get entry work done at all. Frequently you have to pay a premium above the regular scale of wages to get the work done, and when you once get a crew established for doing that work, if you run into a short running-time period you can not keep them on it. The development of your mine will begin to drop off and you have either got to pay a premium for your work or double shift it in order to keep your mine developed to its capacity. (1182) I am not speaking now of what is called the development period in the mines under the car-distribution rules. It is after that period. The miner is not a free agent and he will work where he likes, and if he does not like the place where he is working he will quit. That is what he does—quits his work. The men who drive the entries have to have a little more skill than the room men and they are selected from the other men and put on that work. You have got to give them some inducement to do it, and that is especially true if the entry work is wet, can not be drained, the coal is pitching, and things of that kind, all of which you have got to pay extra for. Any intermittent running time has a bad effect on the ultimate recovery of the coal. The falls in the mine frequently make you lose an entire room and if the room has stopped working for some considerable time the fall may be great enough so that you can not afford to clean
2008 it up. (1183) As to the effect of intermittent running time due to car supply on your sales department, and the good will of your business and your relations with your customers, it has this effect: That you are liable to undersell or oversell the production of your mine, and in addition to that a reduced running time increases the cost of your sales expense because your sales expense is generally fixed and you can not adjust it from month to month. Or, if you have an efficient salesman, if you run into a car shortage period you can not drop him off. You have got to keep up your organization. The situation I have testified to is principally on account of

the output mines. Of course, when cars are assigned from day to day, and not counted against the rating of a mine, any mine that gets those cars takes them away from the mine which does not get any, and it all enters into your cost and reduces your profit.

2009 By Examiner BARTEL:

As to whether I know of any instance in which they place cars at the mine on a partial output basis and do not charge those against the mine (1184), the only thing I know about that is that we have been told—I think that was back in 1920—that if we would load railroad coal on that day, or for two days, those cars would not be charged against our rating. We were told that by the party who was making the arrangement. It usually has been through the superintendent of the railroad, and most of that conversation has always been handled on the telephone.

By Mr. FLETCHER:

It was to take the entire output for one day or two days of one mine, or two or three or four mines. It was always on the basis that the railroad was to take the entire output for those one or two days of those mines.

By Mr. BALLARD:

When I say "without counting the cars against my mine" I do not mean that they gave me a full commercial run on those same days. I mean that they merely gave me enough to buy the full output of that day, although other mines were operating on a percentage basis. (1185) The telephone conversation would be usually on this line; we would be called up on the phone and asked if we could load railroad fuel for one or two days, provided the cars would not be rated, and we would make a decision right then, over the telephone. They would sometimes say " we can not give you any cars unless you do." If we could not get any railroad cars, we would then concede. Our position was that the railroad needed coal and had to have it on that day, and we had better run and give it to them than be idle.

By Mr. FLETCHER:

If we had a supply of commercial cars in sight we would
2010 not give them any. We have frequently done that.

By Mr. BALLARD:

(1186) As to my choice between assigning cars under a six months' or a year's output rule and assigning them from day to day, if cars are going to be assigned I think they should be assigned for a year's period. It is unfair to the operator to take the output of a mine for a period of ninety days or six months and then throw that tonnage back on the market just at a time when other contracts are coming up. It is unfair to the operators who do not have the assigned cars. The operator having assigned cars has the advantage of making profit on his production during that period, and he comes

into the market, may be, during a soft market, and he will immediately make a very low bid on any commercial contracts that may be open at that time. His mining organization is in very much better shape at that time than the other fellow's. (1187) Under an output contract rule, whether the limit is six months or a year, if the railroad does not take anything but the coarse coal they must furnish cars for the operator to put the screenings into, and those would have to be disposed of commercially. In other words, it is impossible to apply the six months' output rule except on a run-of-mine basis unless the railroad took the screenings for shop purposes. I think all of the evils I have testified to that come from the assigned car would be eliminated by an equal pro rata distribution of all cars. It would put every mine on an equal basis as to running time and would eliminate the dissatisfaction upon the part of your labor. You can not keep your miners satisfied when a mine right next to you is running every day and you are only running one or two or three days a week, and during the periods when the market is good you have an additional number of cars to take care (1188) of your commercial business and an opportunity to make a profit on your production. Everybody that knows about the coal
2011 business knows that it is in waves, and a good deal of the time you are selling coal at the cost of production or even below it. When you can not recuperate from those waves when prices are better you are in very bad condition. It does not make any difference what my percentage of increased car supply is. If it is only 1 per cent, the operators should have the benefit of it. I have bought coal for a railroad. I see no reason why it is not possible for a railroad to supply itself with fuel in proper amounts and of a suitable grade and at a reasonable price without the use of the assigned car. As to the way I think this can be done, in my experience in the production of coal nearly every operator wants a railroad contract and is willing to take it on a very close figure in order to keep his organization together during the slack period of certain times (1189) of the year; and every substantial operator realizes the importance of a railroad having its coal, knowing that other coals or other commodities can not be carried to destination unless the railroad has its coal to operate its locomotives, and there are substantial operators enough in every field to furnish any railroad with all the coal that they may require on that railroad. I would protect the supply during a period of car shortage either by a clause to be written into the contract which would protect that, or a general understanding between the railroad purchasing agent and the operator that the first coal produced or billed should be the amount of coal which the railroad required for its current use. During all the time that I was on the Frisco Railroad that plan was in use, and before that also, and I am quite sure a considerable time after that. Possibly the same practice is in force now. I would not be positive about that. As to whether that practice has

ever been in vogue in my district during my experience as a coal operator, it has not exactly. (1190) I have known of cases where some years ago the fuel supply of the Illinois Central Railroad
2012 was distributed among many operators, and some of the operators would try to get away from furnishing their supply of coal when the price had bulged and the agent had instructions to bill the coal to the Illinois Central to the extent of the order each day, and did so. As to the general attitude of the operators at that time towards billing the first coal to the railroads, I have never heard any serious objection to it. In fact, some fellow might have gotten a little anxious about filling an order and thought he would get by for a day; but it never ran into trouble of any kind that I know of. I know that so far as our company was concerned, we felt that our first duty was to the railroad as far as our obligation was concerned. The assigned car was not used at that time by the Illinois Central.

Cross-examination by Mr. FLETCHER:

I do not know of any fuel contracts of the railroads in western Kentucky at the present time for the entire output for a year. (1191) I know there are a number of output contracts in western Kentucky, but as to the duration in time I have no way of knowing. As to whether I know of any instances this year where cars have been placed under the assigned-car basis for fuel coal and then have gone back to the commercial basis the next day or for very short periods, I just want to give you an illustration. One company from which you buy engine coal and to which you furnish a certain number of cars to be loaded with company coal per day has, in the last several months, had some commercial coal for sale and our company has bought it. This particular mine was to furnish coal for a coal chute and had to run over that because they had no storage, and in order to keep the mine going there wasn't enough engine coal being taken, and the company furnished them, I think, 3 cars a day. That is the Illinois Central. (1192) Their production was greater than that, and they frequently had some
2013 commercial coal and our company bought some of that coal. The Daniel Boone is the name of that company. I know the circumstances very well. The mine has to run. They had probably gotten beyond their output—that is, loading the number of cars—and there were extra cars put in there. Just how it worked out I do not know, but I know we bought the coal. They furnished coal, which did not have to be transported in cars, for engine purposes. That was coal which was taken directly from the tipple onto the engine. So that there was no transportation there of railroad fuel at all. In addition to that there were 3 cars a day—I was told that they furnished 3 cars a day.

By Mr. BALLARD:

They were for the railroads.

By Mr. FLETCHER:

I would not know whether or not those cars furnished to them were more or less than their distributive share of cars. I do not know what the rating of that mine was. (1193) If they did not transport this engine coal, that coal would not affect the question at all. There are not any other instances that I know of. We frequently ship by water from all of our mines. (1194) We supply public utilities with coal to some extent. That is under contract. (1195) I would be willing to enter into a contract with the Illinois Central or any other railroad for any very considerable portion of our output with the provision that they would be given preference over our other customers in times of extreme car shortage, even as against our public utility customers. In answer to whether I would be willing to contract for half of our output on that basis, it might be necessary to readjust some of our present contract arrangements; but, as far as the principle is concerned, I would say "yes." As to whether I could sell the rest of our output to anybody, if they knew we had agreed to give our cars to the railroad, any 2014 well-managed operation never sells its entire output on a basis of that kind. It is our practice not to contract over 40 or 45 per cent of our production. (1196)

By Examiner BARTEL:

Assuming there would be but a 50 per cent car supply, in the management of our mines we do not sell over 40 or 45 per cent of it on contract, figuring on car shortage and things of that kind.

By Mr. FLETCHER:

As to whether I would be willing to contract to railroads 50 per cent of our capacity, that would be somewhat in excess of what we have done in the past with anybody, but up to what we would feel would be a safe margin we would be glad to do it if the price was satisfactory. In case of extreme car shortage the other coal would be on the open market. We would not obligate ourselves beyond 40 or 45 per cent. (1197) You can contract with a railroad, a public utility, or anyone else if you do not go beyond what would be conservative, something like 40 or 50 per cent of your production. As to mine labor in the western Kentucky field, generally speaking, there are all the men you can work at the present time. I think there are miners looking for jobs and cannot get them at the present time. As to the inclination of some of our skilled men to drift from our mines to the output mines, that has been the practice ever since I have been in western Kentucky; that is, since 1911. It is correct that for a great many years of that time the roads did not assign cars. (1198) As to whether that drifting was going on when there was no assignment of cars, there were when I first went down there certain companies which enjoyed very large railroad contracts, and our company did not. During the summer months we had very slow running time. That was due

to the lack of orders at that time. After you get an output mine
on a permanent basis, so far as mine labor is concerned, that
2015 drift does not entirely stop. There is always some change
at the mines. I never saw a mine which did not have some turnover. As to 1921, the mines that had the more regular running time drew the best men at that time. The better class of men are desirous of working regularly, and the operator is desirous of securing the best class of labor that is obtainable. (1199) I do not mean to say that every man wants to work six days a week, but when we have regular running time our men work very regularly. We have a full supply of satisfactory mine labor at the present time. The statements I am going to file will be just for one mine. I do not think it would be a fair representation to spread it over all of the mines, because at the time of this difference which shows here we had one of our mines which produces a high-grade coal working very regularly; and, if you spread it over all the mines, that brings the cost up nearer a level. (1200) I mean a mine which was working steadily on account of its orders. That is a joint mine. That improved our car supply at that time. What I am going to show is the same mine at two different periods.

By Mr. CARMALT (1201):

As to why we consider a limit of 40 or 45 per cent for contracts to be a safe figure, we have found from experience that when we enter into contracts without protection we can not safely go above 40 or 45 per cent. That means that the limiting factor at certain periods is the car supply. The reason we do not go beyond that is that we want to protect the contract to 100 per cent, if it is possible to do it. And we can not be protected for the year round unless we limit the amount which we take on a yearly contract. If we had a full car supply, we would probably have some periods in the year when there would not be a market for all the coal. (1202) That depends considerably on the amount of domestic business that you are doing.

If your contracts or obligations are with public utilities
2016 and railroads, those change according to weather conditions
and load conditions in the various States in which the public utilities are located. I said that I looked upon the assigned car rule, applied to a year-round contract, as having a tendency to control the price of coal that could be received by a commercial mine. Any other factor that would tend to control the production or limit the production would be a factor that would increase the price of coal on the other side. (1204) I do not think I testified that in the case of the assigned-car mine the labor turnover was less. I said that they did get the best men on account of their regular working time. I never have had any assigned cars regularly. I think that the assigned-car mines get the pick of the labor. Naturally, their turnover is less than that of the mines that are in competition with them. (1205) As to whether to the extent that their labor situation is stabilized there are less mines for the miners to go to, there is always

a limited turnover at every mine. If there wasn't, our men would not be going to an assigned-car mine. I would say that our men go more in proportion to the assigned-car mines than they do to other mines that are not working on the assigned-car basis. There are less assigned-car mines in our district than there are of other mines. I can not say that the heading men are the best class of labor we have. We pick those men—the entrymen. As to whether they work continuously depends upon the development of the mine. If we are behind on the development, we must continue it at an extra expense. (1206) It is nothing uncommon to have half of the entry work shut down because you can not get men to work in there when the mine is running intermittently. When you have your mine well organized and running regularly, you can establish your crews for that entry work. When you get intermittent running time you have difficulty in keeping those men in there. They are skilled men, and if you only have intermittent time they are usually looking somewhere else to get work regularly.

2017 By Mr. BRONSON:

(1207) If the Illinois Central accumulated coal piles along its way, I would not regard it as objectionable for the Illinois Central to use these coal cars during car-shortage periods to carry coal to distributing points. I think the Illinois Central Railroad, if it had stock piles, would be at perfect liberty to dig those stock piles up and distribute them as long as the balance of the cars were equally distributed among different mines. As to the difference between the Illinois Central mining operations and the stock piles, the Illinois Central mining operations were vastly in competition with us during short-car supply when they supplied a mine 30 or 40 cars during that period.

2018 (1208) As to the difference to us, if they supplied 30 or 40 cars at one mine for the production of coal at that mine that day and these cars were distributed equally among all the mines it might not get more than 8 or 10 cars. The coal-pile operation might or might not affect labor. But the stock pile would not be put in there during a car-shortage period. During a car-shortage period the commercial mine would get the benefit of those cars. The stock pile would be accumulated during a full supply of cars and the cars distributed at the output mines would be 100%. (1209) During a car-shortage period it would oe more than its pro rata share. That would not be true to the same extent at a stock pile. If the stock pile was right at the mouth of the mine, I would not object to the railroad providing necessary cars to carry that coal away during periods of car shortage, providing that the mine itself got a pro rata share of the cars to be distributed. I am talking about all the mines in the territory. If the Illinois Central should accumulate stock piles, there is no objection to that railroad utilizing its cars in sufficient numbers to carry the coal used to its distributing points. When you transform the stock pile into a mine, then I

object to it. (1210) The difference is more than the effect upon labor only. The loss of time in putting cars to the mine and waiting for them to be loaded as compared with putting them into the stock pile is usually quite a considerable difference, and there are very few railroads that have stocks of coal right at the pit mouth. Really coal is stocked near the stations of consumption. The time used in handling the cars from those points is reduced and your mine has got an equal distribution of the cars that you have in the field.

By Mr. BALLARD:

(1211) The time of loading the car as distinguished
2019 from moving it to the point of consumption depends on the loading facilities.

By Mr. FLETCHER:

As to whether coal can be loaded over the tipple more quickly than out of stock pile with a steam shovel that would depend entirely on the size of the mine and the facilities you had for loading from the stock pile.

By Mr. BRONSON:

The effect that the use of the cars at the mine would have upon labor is one of the largest objectionable points.

By Mr. CURRY:

The time when the Frisco Railroad was able to secure its coal without the use of assigned cars was between the years 1907, 1908, and 1909—in fact, before 1906. I do not remember just when.

By Mr. BROWN:

I would not say that they are not using the assigned cars to-day. I do not think so. (1213)

By Mr. CURRY:

The Illinois Central was not using the assigned-car rule in western Kentucky between 1911 and 1916. What they did in Illinois I do not know. At that time they bought about 2 to 2½ million tons of coal in that district. Since the car shortage this year I could not give the number of men we have lost from our mines to assigned-car mines. I am not accurately in touch with that from day to day. I get that from our vice president in charge of operations. We discussed those things during the period of car shortage. I know in western Kentucky we had full running time all summer up until about the 23d of August, and our men worked very regularly, and for the first two weeks we lost very few men after the car shortage started. Then they began to drift away. In conversation with him about that he told me that we had lost a
2020 great many of our best men. He told of several men that went to those assigned-car mines. He gave me their names.
(1214) Some of them were machine men and some timber men.

Some were tracklayers. If you develop a mine so that during a car shortage it would be necessary to advance the entries, it would entail a considerable extra expense. The more unused entries you have the less expense it is to maintain it. In the development of a mine the general practice is to keep your development work in advance of your room work so that you can maintain your maximum tonnage per day. On short running time it is very difficult to keep your entry work up, because the men want to load in the wide places where they can make more money

Redirect examination by Mr. BALLARD:

(1215) Normally the Illinois Central have stored coal at Princeton, Ky., at Paducah, Ky., and I can not say in the last year what they stored south of there, but they have several storage piles south of there at various points. The coal was put on engine tenders right at the terminal where it was stored. Our experience has been in the past that we could safely contract up to 45% of our total production and give our customers 100% on the contract. The normal production in western Kentucky is about twelve million tons a year (1216) and at the present time the Illinois Central Railroad is purchasing outside of its own mines 100 50-ton cars per day. That is about 1½ million tons a year. Of the twelve million tons a year produced in our district about eight million is produced by what I term responsible operators.

Recross-examination by Mr. BRONSON:

(1217) I said that from the years 1911 to 1916 the Illinois Central did not assign cars for railroad fuel in western Kentucky.

There was not a very protracted car shortage, but there was a
2021 car shortage during that time.

By Mr. BALLARD:

I could not tell whether there would be an ample labor supply in western Kentucky to-day if I could get all the cars I needed.

By Mr. BRONSON:

(1222) I do not know whether during the period from 1911 to 1916 the Illinois Central rules provided for the assignment of railroad-company fuel cars. Prices of coal at the mine are generally higher during car-shortage periods than during full-car periods. The market fluctuates. (1223) It would be practicable for operators, or my company, for example, to contract for its entire output with a carrier without assigning cars. The price would be a matter of judgment in making contracts. The question of anticipating the car-shortage periods would depend largely upon the volume of the contract. The extreme car-shortage period has not lasted over such a long period that a year's business would make so very much fluctuation on the price in a year's contract. I would be willing to take a chance on that. (1225) As to whether I regard as economically wise for a railroad to store coal in piles; that would depend on what brought about the necessity for storage.

A. W. VOGTLE, called as a witness and having been first duly sworn, testified as follows:

Direct examination by Mr. BALLARD:

(1226) I am sales and traffic manager of the Corona Coal Company, Birmingham, Ala. This company operates five mines on the Southern Railway, Walker County, Ala., and two mines on the Frisco in the same county. We have a fuel contract with the Southern Railway at the present time. It is their printed contract
2022 form, and I understand it is the same contract the railroad has with other operators in that district. This contract, a copy of which has been offered as my Exhibit No. 49, contains a clause requiring the tonnage called for by it to be shipped first each day. It is the first provision on the second page, "And seller agrees to make full shipment each day to the extent of car supply before any other shipments are made." Contracts entered into by other operators in our district contain this same provision. It is the usual form in our territory. (1227) The fuel orders are distributed among the representative mines there in the district. There are 12 large companies participating in the Birmingham division, Northern Alabama Railway, and probably five companies on their other Alabama division. I have made a copy of the Southern Railway's distribution order of July 1st indicating how tonnage under contracts of this kind is obtained and distributed on the railroad. That is our exhibit No. 50. July 1st is the date that the new contract took effect. That is the contract date of the Southern Railway each year and it shows various mines on the Birmingham division, Northern Alabama Railway, furnishing company coal. The minimum figure is 4,180 tons. In addition they buy several hundred tons a day from other mines in Alabama on other divisions (1228), but I do not know the details. It is a small tonnage and it is distributed in a similar way. This daily total as indicated by Exhibit No. 50 is between 35 and 40% of the daily ratings as they existed at that time. Each of these operators has not sold 35 or 40% of his output to the Southern and agreed to ship it first, but it will average that way. Our Exhibit 51 shows the daily tonnage compared with the present rating on the basis of these same contracts. It takes the daily tonnage from No. 50 and then I have shown in comparison the latest ratings that we have. Those are September 10th.
2023 The first mine shown, the Railway Fuel Company, is a subsidiary of the Southern Railway. That mine is included in this arrangement. They are on the same basis. It has a contract, as I understand it, between the Southern and their subsidiary companies——

By Mr. ROPIEQUET:

I think the reason that the Railway Fuel Company shows a contract tonnage of 1,800 and a daily rating of 1,473 is that they probably estimated that they would normally run 1,800. (1229)

By Examiner BARTEL:

They can get that out very readily.

By Mr. BALLARD:

The first mine on my Exhibit 51 [Railway Fuel Company] will not be given a full run irrespective of the car supply. They have not done that. The Southern Railway has not used assigned cars in our field since the fall of 1920 up to the present time. They have not used them at all during the current car shortage. Their former contracts carried an assigned car clause. These contracts do not. There was no car shortage after the fall of 1920.

By Examiner BARTEL:

As to whether the Southern Railway has had any difficulty in securing its coal under these contracts, we really have not had any test up to the present time, because on July 1st—— (1230) [Witness interrupted] The commission did not issue a class 1 priority for Southern Railway fuel in our field. It did issue some class 1 orders but they applied to foreign roads. They did not apply to the Southern in Alabama. At least they did not put it into effect.

By Mr. BALLARD:

I have nothing further to say about this arrangement for the
2024 Southern Railway, except it is a very satisfactory arrangement and I see no reason why it should not be continued to the mutual benefit of all parties. It is satisfactory to our company and we have had quite a number of differences in the past with the Southern, but we are thoroughly satisfied with this arrangement. I think they want to handle it in a fair manner. So far as the other operators are concerned, their position is similar to that of my company. That was a resolution adopted by our association, the Alabama Mining Institute, of which they are members.

The statements referred to were offered and received in evidence as Exhibits Nos. 49, 50, and 51.

Cross-examination by Mr. BRONSON:

As to the Burnwell mine shown on Exhibit 51 as having a rated capacity of 294 and contract tonnage of 220 per day, that mine in case of a 50% car shortage on the Southern would get a 50% car supply and the railroad would get about 147 tons a day instead of 220. The railroad would be short that day and it would get all the coal produced by that mine that day. (1232) This is minimum tonnage. The Southern can call for maximum. They would get their minimum tonnage on a 37% car supply. The Southern would be short of tonnage that day from that particular mine.

By Mr. BALLARD:

As to finding some other way of getting the tonnage they did not live quite so much from hand to mouth as that. Our tonnage is shown as 60 tons. They can call on us for an additional tonnage. Our rating is 3,310 tons a day. We have a very small Southern Railway contract.